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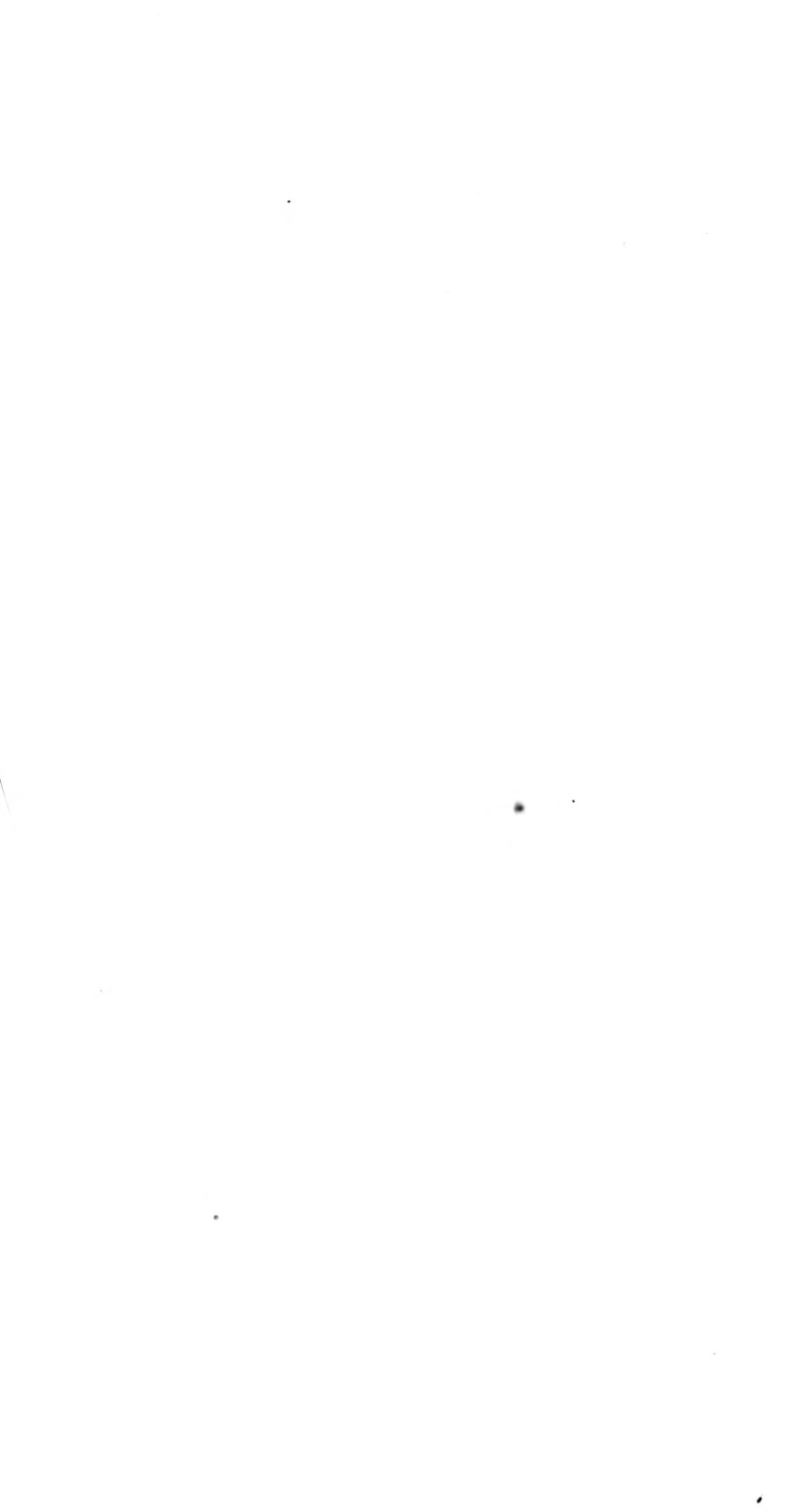
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N. 3003

No. 14982

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United States  
Court of Appeals  
for the Ninth Circuit

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R. P. HILL and MARY HILL, Appellants,

vs.

A. E. WAXBERG, doing business as Waxberg  
Construction Company, Appellee.

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Transcript of Record

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Appeal from the District Court for the District of Alaska,  
Fourth Division

FILED

APR - 9 1956

PAUL P. O'BRIEN, CLERK



No. 14982

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United States  
Court of Appeals  
for the Ninth Circuit

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R. P. HILL and MARY HILL, Appellants,

vs.

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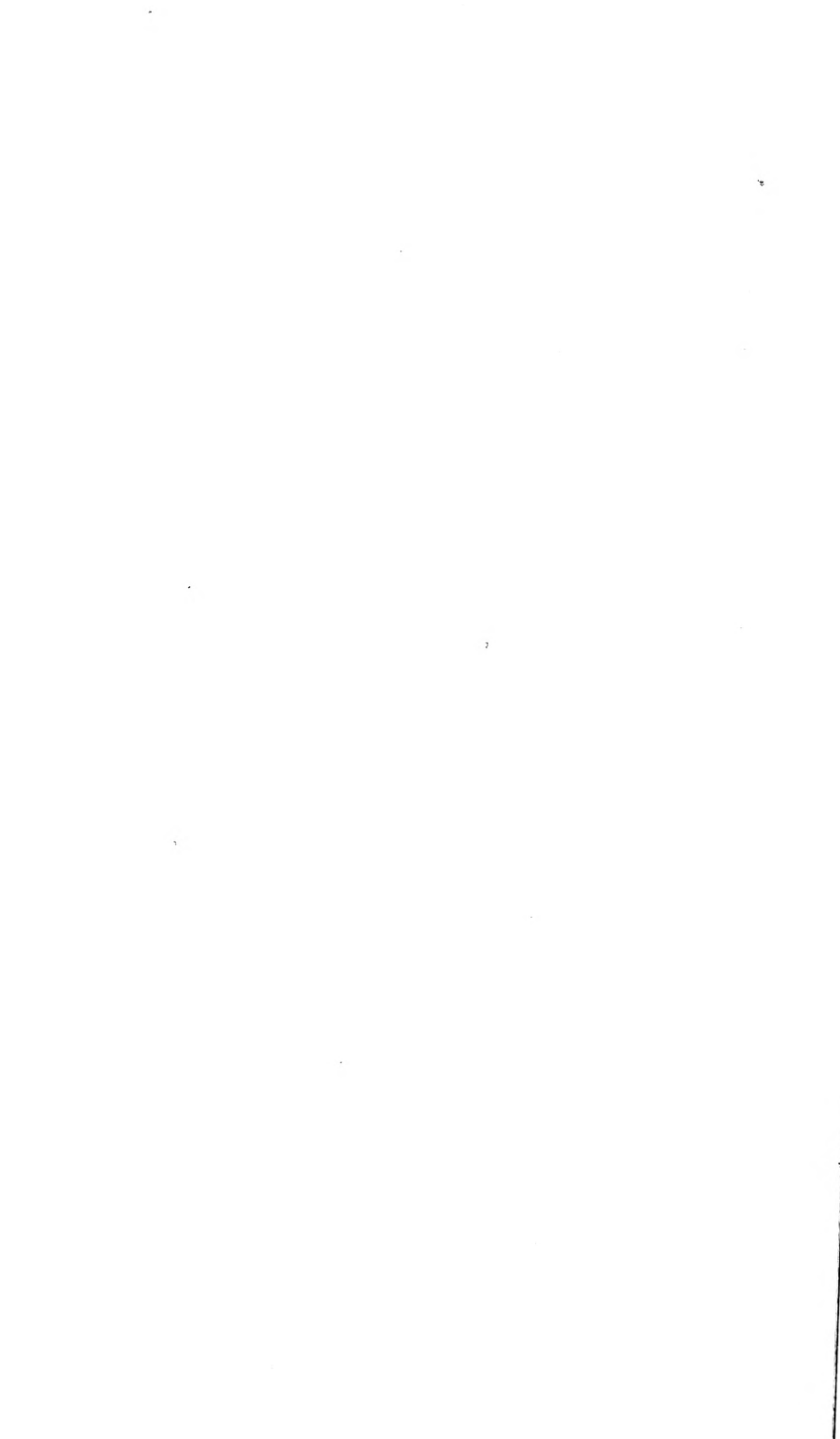
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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P. O. Box 1175,  
Fairbanks, Alaska,

Attorney for Appellant.

ROBT. J. McNEALY,

P. O. Box 1912,  
Fairbanks, Alaska,

Attorney for Appellee.



In the District Court for the District of Alaska,  
Fourth Division

No. 6481

A. E. WAXBERG, d/b/a Waxberg Construction  
Company, Plaintiff,

vs.

R. P. HILL and MARY HILL,  
Defendants.

## SECOND AMENDED COMPLAINT

Now comes the plaintiff and for causes of action against the defendants, alleges and says:

### First Cause of Action

The plaintiff for his first cause of action against the defendants, alleges as follows:

#### I.

That plaintiff is a general contractor and in the building construction business in Fairbanks, Alaska, and that he, together with the defendants, are residents of Fairbanks, Fourth Division, Territory of Alaska, and within the jurisdiction of this Court.

#### II.

That on or about the 16th day of January, 1950, plaintiff and defendants entered into an oral contract whereby plaintiff agreed to construct a building, under Section 608 of the Federal Housing Act and Administrative Rules and Regulations as pro-

vided in the laws of the United States, for defendants to be known as Second and Lacey Street Apartments in Fairbanks, Alaska, within fourteen months; that on or about the 2nd day of February, 1950, plaintiff in accord with said oral contract agreed to construct said building for defendants at a cost of \$1,694,374.00 which offer was accepted by the defendants and plaintiff was instructed by defendants to proceed to do all things necessary to carry out the terms of said contract.

### III.

That plaintiff carried out and performed all of his duties, obligations and agreements under said contract to be kept and performed, but defendants without notice to plaintiff, proceeded to rescind the said oral agreements on or about the 4th day of May, 1950, by securing other sponsors, architects and contractors for the construction of said building and commencing work on said building with said new sponsors, architects and contractors, thereby causing the breach and rescission of the oral contract and agreements between plaintiff and defendants, despite the fact that plaintiff has been, and is, ready, willing and able to carry out all of the terms of said contract and agreements.

### IV.

That by reason of the defendants abandonment and breach of said contract and agreements with plaintiff, notwithstanding plaintiff's part performance, plaintiff has been damaged in a sum repre-



senting the difference between the agreed contract price for construction in the sum of \$1,694,374.00 and the cost of the construction in the sum of \$1,-643,374.00, or the reasonable contractors profit of \$50,826.00 for preliminary costs, supervision, and construction, which sum plaintiff ought, as he believes, to recover from defendants.

## V.

That it has become necessary for plaintiff to employ an attorney to bring this action and plaintiff believes that he should recover a reasonable fee for his said attorney.

## Second Cause of Action

Comes now the plaintiff and for a second and alternative cause of action against defendants alleges and says:

### I.

Re-pleads paragraph I of plaintiff's first cause of action, by reference, as though set out in full again.

### II.

That after numerous preliminaries, on or about the 16th day of January, 1950, plaintiff and defendants entered into an oral agreement with plaintiff whereby plaintiff was engaged to build and construct a building for defendants to be known as the Second and Lacey Street Apartments, in Fairbanks, Alaska, at the fair, reasonable and agreed sum of \$1,694,374.00, and to do all things necessary to effect the premises; and pursuant to said agreement,

plaintiff proceeded to make preliminary investigation surveys and soundings of Lots 1, 2, and 3 of Block 12, the property on which said building was to be constructed expending 14 days of plaintiff's time on such work connected with estimate and preliminary matters, consulting with the Philleo Engineering Service, City Utilities, and others, and employed and paid Williams Equipment Company the sum of \$470.00 for taking soundings on said property for footings for the proposed building, and performed other acts necessary to the agreement between the parties hereto.

### III.

That the parties hereto decided to construct said building under a loan under Section 608 of the Federal Housing Act and the Administrative Rules and Regulations thereof and defendants requested plaintiff to continue with the contract and preliminary work necessary to secure said loan and to prepare for construction, whereupon plaintiff employed and paid L. Orsini \$500.00 to prepare financial statements and other papers necessary to meet FHA requirements and did employ and pay R. J. McNealy, attorney, the sum of \$200.00 for legal services in connection with plaintiff's agreement aforesaid.

### IV.

That in connection with said agreement, plaintiff accompanied the defendant, R. P. Hill, to Seattle, Washington, on January 29, 1950, and consulted with banking houses and officers of the FHA for

the defendants until February 2, 1950, when plaintiff took a plane to Juneau, Alaska, to consult with the FHA Administrator for Alaska on behalf of defendants for a period of two days before returning to Fairbanks, Alaska, on February 5, 1950, making a total of eight days of plaintiff's time spent in service of defendants; that on said trip the plaintiff's hotel bill was \$25.00, meals and taxi service amounted to \$64.00 and the sum of \$217.35 for transportation on Pan American Airways.

#### V.

That in connection with said agreement, plaintiff again traveled to Seattle, Washington, on the 1st day of March, 1950, and was engaged for a period of 16 days on behalf of defendants with banks, architects, FHA officials and materialmen, returning to Fairbanks, Alaska, on the 16th day of March, 1950, having paid out \$166.51 for hotel bills, including phone charges with reference to defendants work, the sum of \$128.00 for meals and taxi service and the sum of \$217.35 to Pan American Airways for plane transportation on said trip.

#### VI.

That according to plaintiff's information and belief, the defendant, R. P. Hill, was not in Fairbanks, Alaska, on May 4, 1950, at which time plaintiff was informed that defendants were securing other contractors to construct the proposed building and plaintiff again flew to Seattle, Washington, on May 4, 1950, and consulted with banks, archi-

pects, FHA officials and contractors with reference to the proposed apartment building and after five days learned that the defendants had notified architects, contractors, and the FHA, that plaintiff was no longer connected with him and that defendants had broken, canceled and abandoned the contract with plaintiff; that plaintiff's expenses on said trip of five days were: Hotel bills—\$37.59, meals and taxi service—\$40.00, and the sum of \$217.35 for plane fare via Pan American Airways.

## VII.

That defendants have revoked and rescinded their agreement with plaintiff, and as a result thereof, the contract with plaintiff has been breached by defendants, notwithstanding that plaintiff done, kept, and performed all of the obligations and conditions that he was obliged to do and perform under the contract with defendants and further notwithstanding that plaintiff is still ready, willing and able to perform under the original contract, save that by delay of defendants, time for performance would have to be extended, and as a result of defendant's wrongful breach of said contract the plaintiff has been damaged in the sum of \$4,300.00 representing 43 days time spent in service of defendants, being the going wage at the fair and reasonable sum of \$100.00 per day charged by contractors for such services in and about Fairbanks, Alaska; airplane fare of \$652.05; the sum of \$229.10 for hotel and phone bills; the sum of \$232.00 for meals and taxi services; the sum of \$470.00 paid to Williams

Equipment Co.; the sum of \$500.00 paid to L. Orsini; and the sum of \$200.00 paid to R. J. McNealy, attorney, all of which totals \$6,583.15, which sum plaintiff ought as he believes to recover from defendants, for the reason that defendants benefited by, and took advantage of, plaintiff's labor, services and money expended under said contract.

### VIII.

That it has become necessary for plaintiff to employ an attorney to bring this action and plaintiff believes that he should recover a reasonable fee for his said attorney.

#### Third Cause of Action

Plaintiff, for his third and alternative cause of action against defendants, alleges:

#### I.

Re-pleads paragraph I of plaintiff's first cause of action, by reference, as though set out in full again.

#### II.

Re-pleads paragraph II of plaintiff's second cause of action, by reference, as though set out in full again.

#### III.

Re-pleads paragraph III of plaintiff's second cause of action, by reference, as though set out in full again.

#### IV.

Re-pleads paragraph IV of plaintiff's second

cause of action, by reference, as though set out in full again.

#### V.

Re-pleads paragraph V of plaintiff's second cause of action, by reference, as though set out in full again.

#### VI.

Re-pleads paragraph VI of plaintiff's second cause of action, by reference, as though set out in full again.

#### VII.

That if plaintiff is denied the right to recover from defendants under his first or second cause of action, then as an further alternative, plaintiff should recover from defendants quantum meruit for the reasonable value of services performed by him as part performance under said agreement with plaintiff and in addition thereto to be allowed his expenses in the sum of \$2,283.15.

#### VIII.

That it has become necessary for plaintiff to employ an attorney to bring this action and plaintiff believes that he should recover a reasonable fee for his said attorney.

Wherefore, plaintiff prays judgment against defendants as follows:

1. For the sum of \$50,826.00 on plaintiff's first cause of action, or
2. For the sum of \$6,583.15 on plaintiff's second and alternative cause of action, or

3. For judgment Quantum Meruit for services rendered defendants, plus the sum of \$2,283.15 expenditures, on plaintiff's third and alternative cause of action.

4. For plaintiff's costs and disbursements, including a reasonable fee for his attorney.

/s/ R. J. McNEALY,  
Attorney for Plaintiff

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed November 21, 1951.

---

[Title of District Court and Cause.]

### AMENDED ANSWER

Comes Now, the named Defendants and for Amended Answer to Plaintiff's Second Amended Complaint, admit and deny as follows:

For Answer to Plaintiff's First, Second and Third Causes of Action:

#### First Defense

That there was never a contract or other agreement between the Plaintiff and Defendants wherein Defendants, or either of them, agreed to pay to the Plaintiff money for the construction of a building in Fairbanks, Alaska, or for the payment by Defendants to Plaintiff money for services rendered or to be rendered by Plaintiff, or any person, firm

or corporation, for or in behalf of Defendants, or either of them.

### Second Defense

That any agreement made by Defendants or either of them to pay money to Plaintiff for the construction of a building in Fairbanks, Alaska, or for any other reason or purpose, if such an agreement there was, is void and unenforceable on the grounds and for the reason that same was gratuitous and without consideration.

### Third Defense

That no written contract, note or other memorandum for the construction of a building was ever executed between Plaintiff and Defendants or either of them, and subscribed by said persons, and that said contract, if contract there was, was not to be performed, nor intended to be performed, within one year from the making thereof and that such contract or agreement is therefore void as provided by Section 58-2-2 (1) ACLA, 1949.

### Fourth Defense

That any time, energy, effort or money expended by the Plaintiff herein were not expended at the instance or request of Defendants, or either of them, in accordance with any contract or other agreement, but such expenditure of time, energy effort or money was expended by Plaintiff at Plaintiff's risk in an effort to secure, and preliminary to securing a contract or other agreement between Plaintiff and Defendants for the construction of a building in Fairbanks, Alaska under an FHA commitment.



## Fifth Defense

That Plaintiff performed no service of value to Defendants, or either of them.

## Sixth Defense

That Defendants, nor either of them, ever promised or agreed to pay unto Plaintiff any sum of money, nor did Defendants, or either of them, request Plaintiff to perform any service or to secure the performance of any service for them, or the employment of any person, firm or corporation, nor did Defendants, or either of them, request Plaintiff to expend any money, time, energy or effort in their behalf; nor did Defendants, or either of them, authorize the expenditure of Plaintiff's money for or in behalf of Defendants, nor did Defendants, or either of them agree at any time to reimburse Plaintiff for any such expenditure, or expenditures.

## Seventh Defense

That the time, energy, effort and money expended by the Plaintiff were normal incidents of the building construction business and such expenditures were no different in character than those performed by any building construction contractor preliminary to, and in an effort to secure a contract for the construction of a large building involving one and three-quarter million of dollars.

## Eighth Defense

That as a condition precedent to the commencement of construction of all FHA projects the said

FHA requires the execution of building construction contractor's performance bond, which bond the Plaintiff herein was unable to secure, the posting of such performance bond being also a condition precedent upon which depended Defendants' duty to perform any agreement between Plaintiff and Defendants, or either of them.

Ninth Defense To  
Plaintiff's First Cause of Action:

I.

Defendants admit the allegation of Paragraph I.

II.

Defendants deny each material allegation of Paragraph II.

III.

Defendants deny each material allegation of Paragraph III.

IV.

Defendants deny each material allegation of Paragraph IV.

V.

Defendants deny each material allegation of Paragraph V.

Ninth Defense To  
Plaintiff's Second Cause of Action:

I.

Defendants admit the allegations of Paragraph I.

II.

Defendants deny each material allegation of Paragraph II.

III.

Being without sufficient information upon which to form a belief Defendants deny that Plaintiff employed L. Orsini and R. J. McNeally, Defendants deny each and every other material allegation in Paragraph III.

IV.

Defendants deny each material allegation in Paragraph IV.

V.

Defendants deny each material allegation in Paragraph V.

VI.

Being without sufficient information upon which to form a belief, Defendants deny each material allegation in Paragraph VI.

VII.

Defendants deny each material allegation of Paragraph VII.

VIII.

Defendants deny each material allegation of Paragraph VIII.

Ninth Defense To  
Plaintiff's Third Cause of Action:

I.

Defendants admit the allegations of Paragraph I.

## II.

Defendants deny each material allegation of Paragraph II.

## III.

Defendants deny each material allegation of Paragraph III.

## IV.

Defendants deny each material allegation of Paragraph IV.

## V.

Defendants deny each material allegation of Paragraph V.

## VI.

Defendants deny each material allegation of Paragraph VI.

## VII.

Defendants deny each material allegation of Paragraph VII.

## VIII.

Defendants deny each material allegation of Paragraph VIII.

Wherefore having fully answered, Defendants pray that Plaintiff take nothing on his Complaint on file herein.

/s/ ROBERT A. PARRISH,

Of Attorneys for Defendants

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed September 24, 1952.

[Title of District Court and Cause.]

### THIRD AMENDED COMPLAINT

Plaintiff complains of defendants and alleges:

#### I.

That plaintiff is a general contractor and in the building construction business in Fairbanks, Alaska, and that he, together with the defendants, are residents of Fairbanks, Fourth Division, Territory of Alaska, and within the jurisdiction of this Court.

#### II.

That plaintiff and defendants met several times during the month of December, 1949, and on occasions thereafter, and discussed the construction of a business and apartment building on defendants property between First and Second Avenues on Lacey Street in Fairbanks, Alaska, and for the purpose of securing a commitment under Section 608 of the Federal Housing Authority to secure funds with which to do said construction.

#### III.

That plaintiff and defendants agreed that plaintiff was to construct said building, if and when a F.H.A. commitment was secured and after necessary plans and specifications were prepared to determine cost of construction.

#### IV.

That pursuant to said discussions and agreement and at the request of defendants plaintiff became a

co-sponsor on an application for the F.H.A. commitment for a loan to construct said building, and proceeded to do the other necessary and preliminary work in furtherance thereof.

## V.

That in connection therewith, early in January of 1950 plaintiff employed L. Orsini to prepare the necessary statements and preliminary papers to make application for the F.H.A. commitment, which service was successfully performed and plaintiff paid the said Orsini the sum of \$500.00 therefor.

## VI.

That in order to supply the architects employed by defendants with preliminary information on which to base plans and specifications for the F.H.A. commitment and later construction, plaintiff employed the Philleo Engineering Service to survey defendants' lots and employed Williams Equipment Company to take soundings for footings and foundations for the proposed building and plaintiff paid said Williams Equipment Company the sum of \$470.00 for their services in this connection.

## VII.

That in connection with services performed on behalf of defendants, the plaintiff spent 43 days of his time on said preliminary work and plans, making three or four trips to Seattle and one trip to Juneau via Pan American Airlines on behalf of said project at a total cost of \$626.88 in airplane

fare, and the sum of \$220.10 for hotel expenses, which time, travel and expense was incurred for defendants' benefit by plaintiff doing preliminary work in Fairbanks, and consulting with banks, materialmen, F.H.A. officers and architects in Seattle, Washington, and making one trip to Juneau, Alaska, at request of defendants.

### VIII.

That as the direct result of all of plaintiff's efforts, services and expenditures, an F.H.A. commitment under Section 608 was issued on the 24th day of February, 1950, just prior to expiration of this type of loan guarantee in Alaska, and plaintiff and defendants were named as sponsors on said commitment.

### IX.

That for a time after said commitment was issued plaintiff continued to work on preliminary plans for the construction of said building for defendants, but prior to the time final plans and specifications were drawn, defendants demanded that plaintiff pay to them \$50,000.00 of the expected builder's profit for constructing said building and upon plaintiff's refusal to so do, defendants severed their connections and association with plaintiff and secured another contractor to construct a building for them, being the present Polaris Building in Fairbanks, Alaska.

### X.

That by reason of all of the transactions between the parties and by virtue of defendants failing to

make a contract with plaintiff for a specified sum to construct the building for them, an implied contract exists to pay plaintiff for the reasonable value of his services and expenditures on behalf of defendants as is evidenced by the conversations and actions of the parties in connection with the F.H.A. commitment, preliminary plans, and negotiations for construction.

Wherefore, plaintiff prays the Court that he recover from defendants quantum meruit, the reasonable value of his services and expenditures for defendants benefit, together with a reasonable fee for his attorneys and his costs and disbursements in this action.

EVERETT W. HEPP and

R. J. McNEALY,

/s/ By R. J. McNEALY,

Of Counsel for Plaintiff

Duly Verified.

[Endorsed]: Filed August 3, 1955.

---

[Title of District Court and Cause.]

## DEFENDANTS REQUESTED INSTRUCTIONS

### Defendant Requested Instruction No. 1

You are hereby instructed that the Plaintiff is not entitled to a recovery against the defendants in any amount, if he performed services or expended money for the purpose of obtaining business through a hoped for contract.



[In longhand]: Defendants' Requested Instructions 1 to 5, inclusive, are each and all denied. Dated Aug. 4, 1955. Signed Vernon W. Forbes, Judge.

Defendants Requested Instruction No. 2

If, in this case, you find that the services rendered by the Plaintiff or the monies expended by him were as much in his interest or for his benefit as in the interest or for the benefit of the Defendants, and were rendered and expended for the purpose of securing a commitment for insurance, and at the time that such services were rendered or monies were expended that the Plaintiff had no expectation of charging therefore then, and in that event, you must find for the Defendants and against the Plaintiff.

Defendants Requested Instruction No. 3

For the Plaintiff to recover from the Defendants the reasonable value of his services or the amount of monies which he expended, you must have been convinced by a preponderance of the evidence that the services and expenditures of the Plaintiff and the reception thereof by the Defendants were performed and made by the Plaintiff and accepted and received by the Defendants with a mutual understanding by both the Plaintiff and the Defendants that the Defendants were to pay for same.

Defendants Requested Instruction No. 4

If you the Jury believe that the Plaintiff ren-

dered services or expended monies without an expectation of compensation from these defendants, you must find for the Defendants and against the Plaintiff.

Defendants Requested Instruction No. 5

In this case, to find in favor of the Plaintiff and against the Defendants, you must be convinced by a preponderance of the evidence that, at the time the Plaintiff rendered services or expended money, he then expected these Defendants to pay him therefor, and that the services were rendered by the Plaintiff and received by the Defendants under such circumstances as to cause the Defendants to expect that they were to pay therefor.

Acknowledgment of Service attached.

[Endorsed]: Filed August 4, 1955.

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[Title of District Court and Cause.]

VERDICT No. I

We, the Jury, duly empaneled and sworn to try the above entitled cause do find for the plaintiff and award damages to the plaintiff in the sum of \$11,067.46.

Dated at Fairbanks, Alaska, this 4th day of August, 1955.

/s/ EDSON W. HARDENBROOK,  
Foreman

[Endorsed]: Filed August 5, 1955.

[Title of District Court and Cause.]

MOTION FOR A JUDGMENT NOTWITH-  
STANDING THE VERDICT, OR FOR A  
NEW TRIAL

Comes Now the above named Defendant R. P. Hill, by and through his Attorney George B. McNabb, Jr., and moves this Honorable Court for a new trial in the above entitled cause, or in the alternative, for a judgment notwithstanding the verdict heretofore rendered in said cause: This motion is based on the following grounds, to-wit:

I.

That the Court erred in overruling Defendant's motion for a directed verdict at the close of the Plaintiff's evidence.

II.

That the Court erred in granting leave to the Plaintiff for the filing of an Amended Complaint subsequent to the Defendant's Motion for a directed verdict.

III.

That the Court erred in refusing Defendant's motion for a directed verdict at the close of the case.

IV.

That the Court erred in refusing each and every and all of the Defendant's requested instructions.

## V.

That the verdict of the Jury was contrary to the evidence.

## VI.

That the verdict was excessive in amount.

## VII.

That there was insufficient evidence to justify the verdict.

## VIII.

That the Court erred in refusing to grant the Defendant a continuance after allowing Plaintiff to file an Amended Complaint.

## IX.

That the Jury was influenced by passion or prejudice against the Defendant and awarded an excessive verdict.

Dated this 9th day of August, 1955.

/s/ GEORGE B. McNABB, JR.,  
Attorney for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed August 9, 1955.

In the District Court for the District of Alaska,  
Fourth Division

No. 6481

A. E. WAXBERG, d/b/a Waxberg Construction  
Co., Plaintiff,

vs.

R. P. HILL, Defendant.

### JUDGMENT

This Cause came on regularly for trial, plaintiff being present in Court and represented by his attorneys, Everett W. Hepp and R. J. McNealy, and defendant being present in Court and represented by his attorney, George B. McNabb, Jr., and a Jury having been duly empanelled and sworn to try the issues in the above-entitled cause, and testimony and evidence having been submitted on behalf of plaintiff and defendant, and arguments of counsel for the respective parties to this action having been made, and the Court having instructed the Jury as to the law in the case, and the Jury having considered the law and the evidence duly returned into Court their Verdict of the 4th day of August, 1955, as a sealed Verdict on the 5th day of August, 1955, as provided by stipulation of the respective attorneys, and in words and figures, together with later endorsements thereon, as follows:

Filed in the District Court, Territory of Alaska,  
4th Div., August 5, 1955.

John B. Hall, Clerk

## Verdict No. I.

We, the Jury, duly empaneled and sworn to try the above entitled cause do find for the plaintiff and award damages to the plaintiff in the sum of \$11,067.46.

Dated at Fairbanks, Alaska, this 4th day of August, 1955.

/s/ Edson W. Hardenbrook, Foreman

August 5, 1955 Entered in Court Journal No. 52  
Page 189.

It further appearing that plaintiff on the 24th day of April, 1951, caused all of the right, title and interest of defendant, in and to Lots 1, 2 and 3 of Block 12 of the Townsite of Fairbanks, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, to be attached in this cause by the United States Marshal for the Fourth Division, District of Alaska, in the sum of \$6,583.15, and on the 18th day of May, 1951, plaintiff instructed said marshal to release from said attachment all of said realty except the following described real property situated in the Townsite of Fairbanks, Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and more particularly described as:

That portion of Lots one (1) and two (2) of Block Twelve (12), being the Hill Cocktail Bar more fully described as:

Beginning at the SE corner of Lot 2, Block 12, of the Fairbanks Townsite, said point being the SE corner of the building; thence appx. N 8°16' W a distance of about 75 feet to the NE corner of said building; thence appx. S 81°44' W a distance

of about 45 feet to the NW corner of the building; thence about S 8°16' East a distance of 4 feet; thence about N 81°44' E a distance of 3 feet; thence in a southerly direction about 66 feet to the SW corner of the building being on the North side of Second Avenue about 39 feet westerly from the SE corner of said Lot 2; thence N 82°15' E along Second Avenue to point of beginning.

That return of the attachment writ was made by said marshal on the 27th day of June, 1951, and except as aforesaid, said attachment has not been released.

Now, Therefore, in accordance with the Verdict of the Jury, it is hereby

Ordered, Adjudged and Decreed that plaintiff have and recover from defendant the sum of \$11,-067.46, and the sum of \$700.00 as fees for plaintiff's attorneys, together with his costs and disbursements in the sum of \$43.00 as taxed by the Clerk of this Court, said Judgment to draw interest at the rate of 6 per centum per annum from the date hereof, and it is

Further Ordered, Adjudged and Decreed that plaintiff may cause the right, title and interest of the defendant in and to the above described real property held under attachment by the United States Marshal for the Fourth Division, District of Alaska, to be sold according to law to satisfy plaintiff's demands to the extent of \$6,583.15, and if execution issue on this Judgment, the overplus after satisfaction of such execution shall be delivered to the defendant.

Done at Fairbanks, Alaska, this 3rd day of October, 1955.

/s/ VERNON D. FORBES,  
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed October 3, 1955.

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[Title of District Court and Cause.]

### ORDER

The Court having considered the matters in the defendants' Motion for a Judgment notwithstanding the Verdict and Motion for a New Trial and now being fully advised in the premises, it was Ordered that the Motions be denied.

Entered in Court Journal Oct. 4, 1955.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the Defendants above-named, R. P. Hill and Mary Hill, hereby appeal to the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the judgment entered in this action on the 3rd day of August, 1955, and from the order entered on October 4, 1955, denying Defendants' motion for a new trial.



Dated at Fairbanks, Alaska, this 17th day of October, 1955.

/s/ GEORGE B. McNABB, JR.,

Attorney for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed October 19, 1955.

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[Title of District Court and Cause.]

### STATEMENT OF POINTS ON APPEAL

Appellant states the following points upon which he will rely on Appeal.

1. That the Court erred in overruling Defendant's motion for a directed verdict at the close of the Plaintiff's evidence.

2. That the Court erred in granting leave to the Plaintiff for the filing of an Amended Complaint subsequent to the Defendants' Motion for a directed verdict.

3. That the Court erred in refusing Defendants' motion for a directed verdict at the close of the case.

4. That the Court erred in refusing each and every and all of the Defendants' requested instructions.

5. That the verdict of the Jury was contrary to the evidence.

6. That the verdict was excessive in amount.

7. That there was insufficient evidence to justify the verdict.

8. That the Court erred in refusing to grant the Defendants a continuance after allowing Plaintiff to file an Amended Complaint.

9. That the Jury was influenced by passion or prejudice against the Defendants and awarded an excessive verdict.

10. That the trial Court erred in overruling Defendants' Motion for Judgment Notwithstanding the Verdict or For a New Trial.

11. That the Court erred in its instructions to the Jury.

Dated at Fairbanks, Alaska, this 12th day of December, 1955.

/s/ GEORGE B. McNABB, JR.,

Attorney for Defendant Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed December 13, 1955.

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed on the defendants' Designation of Record and Additional Designation of Record, viz.:

1. Second Amended Complaint.
2. Amended Answer.
3. Third Amended Complaint.

4. Motion for Judgment, Notwithstanding the Verdict, or For a New Trial.
5. Hearing on above Motions.
6. Order denying above Motions.
7. Notice of Appeal.
8. Verdict No. 1.
9. Statement of Points on Appeal.
10. Designation of Record.
11. Additional Designation of Record.
12. Defendants' Requested Instructions to the Jury.

Witness my hand and the seal of the above-entitled Court this 17th day of December, 1955.

[Seal]            /s/ JOHN B. HALL,  
                         Clerk of the Court

In the District Court for the District of Alaska,  
Fourth Judicial Division

No. 6481—Civil

A. E. WAXBERG, d/b/a Waxberg Construction  
Co., Plaintiff,

vs.

R. P. HILL, Defendant.

### TRANSCRIPT OF PROCEEDINGS

Dates: August 1, 2, 3, and 4, 1955.

Place: Fairbanks, Alaska.

Before: Hon. Vernon D. Forbes, District Judge,  
and Jury.

Appearances: Robert J. McNealy and Everett W. Hepp, of Fairbanks, Alaska, attorneys for plaintiff. George B. McNabb, Jr., of Fairbanks, Alaska, attorney for defendant.

Mary F. Templeton, Official Court Reporter. [1\*]

Be It Remembered, that at 10:00 a.m., upon the 1st day of August, 1955, the trial of this cause, No. 6481, was begun, plaintiff and defendant represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Will the Clerk, please, call the roll of the jury.

(Whereupon, the Clerk of the Court proceeded to call the roll of the jury.)

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\* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Clerk of Court: How many does that make, Mrs. Wann?

Bailiff: Thirty-three.

Clerk of Court: Thirty-three present, your Honor. Six absent. I am not too sure they haven't been excused, some of them.

The Court: May I see the list of the absentees.

This is the time fixed for the trial of civil cause 6481, Waxberg vs. R. P. Hill and Mary Hill. Counsel ready to proceed?

Mr. McNealy: Ready, your Honor.

Mr. McNabb: Defendants are ready, your Honor.

The Court: We have a sufficient number of jurors to proceed and both the plaintiff and the defendant ready to proceed with the thirty-three that responded to roll call?

Mr. McNealy: Yes, sir.

The Court: The Clerk will now draw twelve names from the jury box.

(At this time, Mr. McNealy made a brief statement to [3] the veniremen and Mr. McNabb and Mr. McNealy proceeded to impanel a jury.)

(A jury was duly impaneled and sworn to try the above named cause.)

Clerk of Court: The remaining jurors are excused until next Monday morning at ten o'clock.

The Court: Ladies and gentlemen, you have now been selected as jurors to try this case. While no evidence has yet been submitted to you I nevertheless admonish you not to discuss the case with

anyone or among yourselves, and do not form, of course, any opinion until the case is finally submitted to you and you are excused until two o'clock. And counsel will you, please, remain.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

The Court: Let the record show the presence of the parties and their respective attorneys and the absence of any of the jurors. And, gentlemen, it isn't quite timely but I wonder if you wish to stipulate that in the event of the disability of any of the jurors that a verdict might be returned by eleven?

Mr. McNealy: The plaintiff will so stipulate, your Honor.

Mr. McNabb: The defense will stipulate to that effect.

The Court: Very well, and next, gentlemen, perhaps somewhat in the nature of a pre-trial although the trial is [4] actually commenced in this case, the jury having been selected. I wish that counsel for the plaintiff would enlighten the Court on two or three matters and one is the first cause of action as I understand it from a reading of the second amended complaint is clearly an action for a breach of an alleged contract. And I believe that it is the plaintiff's theory that the contract was for a certain figure and that had the plaintiff been permitted to complete the alleged contract that his profit would have been fifty thousand eight hundred

twenty-six dollars. That is the theory of the first cause of action, Mr. McNealy?

Mr. McNealy: Yes, your Honor, that is.

The Court: And the allegations that the plaintiff has performed all of his duties, obligations and agreements under the contract to be kept and performed, how is the Court to interpret that? The building was built by the plaintiff? I call your attention to Paragraph two of the second amended complaint, Paragraph three on top thereof that plaintiff carried out and performed all of his duties and obligations and agreements under said contract to be kept and performed; that the defendants without notice to plaintiff proceeded to rescind the said oral agreements.

Mr. McNealy: The meaning of that, your Honor, while it may not be as clear as it should be is that he performed all of his preliminary duties in regard, and obligations that were necessary at the, to begin to carry out the contract work, your Honor, and we close the paragraph stating, of course referring [5] back to that time that he was ready, willing and able to carry out all of the contract. We refer merely to the preliminary work that was done.

The Court: Then to assist in the trial, the Court is wondering about paragraph 2 of the second amended complaint, that on or about the 16th day of January, 1950, plaintiff and defendant entered into an oral contract. Now, that refers to an agreement on the 16th day of January, 1950, and later on in the same paragraph, that on or about the 2nd day of

February, 1950, at a cost of so much money, what is the plaintiff's theory in regard to that? The two specific dates alleged in the complaint.

Mr. McNealy: The testimony in support thereof, your Honor, will be that the actual agreement to construct this building was done about the 16th of January and that between the 16th of January and the 2nd of February the plaintiff was required to furnish the cost estimate of the building and in that interim time had prepared his cost estimate which was the only thing, only further step for him to do in regard to the contract at that time, which was to determine the materials and costs that would be required to carry out the contract.

The Court: Is it your theory that that agreement on the 16th day of January, 1950, was the fixed contract between the parties, regardless of how much might be determined later, the cost of the building would be?

Mr. McNealy: Yes, your Honor. [6]

The Court: I mean, if that figure had been three million it was still the agreement of the parties the contract was made on the 16th of January, 1950? I was just wondering about your theory, if there could be a fixed contract before the price had been determined?

Mr. McNealy: Well, I believe that the testimony, your Honor, shows an approximate figure decided upon and on the 16th of January Mr. Hill asked Mr. Waxberg to figure out the exact costs rather than an approximate figure which as I remember, was somewhere around a million and a half dollars



was talked about originally. That is as of the 16th of January.

The Court: Now, for the Court's enlightenment, can you point out to me to assist in the trial of this cause the difference between the second cause of action and the third cause of action. What is the theory of it and, of the second cause, and what is the theory of the third cause?

Mr. McNealy: That, your Honor, goes back to possibly the reason for a second amended complaint being filed. I believe we argued these in prior times before the Court that we would set it up as a second cause of action. However, strictly speaking, it is an alternative cause of action that in the event, in the event that plaintiff were unable to prove his contract under the first cause of action, then our alternative cause would be for him to recover the money under the oral agreement which he expended in actual work done on the premises in connection with the original agreement together with a reasonable sum, which I believe was set out in here, a hundred dollars a day for the time which the [7] plaintiff devoted to this.

The Court: How is that distinguished from the third cause?

Mr. McNealy: And in the third cause of action, your Honor, we have asked there as an alternative cause in the event of failure of the other two causes that as an alternative cause that the plaintiff recover on a narrowed basis which would be in effect leaving it to the jury to decide what the fair and

reasonable value of such services that the plaintiff had performed.

The Court: Counsel, don't the second and third cause, causes, aren't they the same?

Mr. McNealy: I believe, your Honor—(Interrupted)

The Court: You say we had so much expense and our services were worth so much money. If there is any difference in counsel's mind I want to know it for my own guidance. I can't see anything that distinguishes the two but possibly there is some.

Mr. McNealy: I question in my own mind whether it has a great deal of effect, your Honor, on the case. Strictly speaking, the only difference I have found there is that I know is there is the fact that the second cause of action, the plaintiff has asked for or stated one hundred dollars a day was a reasonable value for his services, whereas in the third cause of action it was left open as to what the value of his services was.

Mr. Hepp: May it please the Court, I think there is one other distinction there. The second cause of action would be, of course the Court's theories of the plaintiff that whether or not [8] services were of any value to the defendant. They were sound in contract. He had requested they be performed and they were so performed as alleged, at least as alleged here by the plaintiff in this cause which would give him a contractual right for recovery regardless of whether they were of any value at all to the defendant. In the third cause, it is narrowed. I think that there is a technical distinction. I did not draw

the pleadings in this cause, but I discern that as I studied those pleadings.

The Court: Mr. Hepp, if there should be a recovery on the first cause, wouldn't that preclude recovery on the second and third?

Mr. Hepp: These are alternative prayers.

The Court: Now, Mr. McNealy, one of the defenses raised is the statute of frauds. Do you have any authorities on that subject you might submit to the Court prior to the trial?

Mr. McNabb: I have them, not at the moment, your Honor, but I have them at the office that I can submit.

The Court: And, of course, that would also mean that the plaintiff may submit authorities on that point, as you may wish but I would like to have them. I have looked at the Territorial statute of frauds which is unlike any I have ever seen, but if you have any law on that subject, counsel, I would like to have it. The Court will adjourn. Let's see, Mr. Stevens, you have something? This case is continued until two o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.) [9]

### Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Parties wish to have the jury polled?

Mr. McNealy: We will stipulate they are all present, your Honor.

Mr. McNabb: Yes, your Honor.

The Court: Very well.

Mr. McNealy: We would like to make a brief opening statement, your Honor.

The Court: Very well.

(Thereupon, Mr. McNealy made an opening statement to the jury in behalf of the plaintiff.)

(Thereupon, Mr. McNabb made an opening statement to the jury in behalf of the defendant.)

A. E. WAXBERG

the plaintiff, appearing as a witness in his own behalf, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Hepp): Would you state your name to the Court and jury, please.

A. A. E. Waxberg.

Q. Where do you live, Mr. Waxberg?

A. Fairbanks, Alaska.

Q. What is your occupation?

A. General contractor. [10]

Q. How long have you been engaged in the, in an occupation that is related to the building trades, general contracting as such?

A. About thirty years.

Q. And how much of that time has been spent, if any, in the Fairbanks area?

A. Eighteen years.

Q. Do you have a business here?

A. I do.

Q. Where is your business, sir?

A. Wendell and Lacey.

(Testimony of A. E. Waxberg.)

Q. You have been engaged in that business for eighteen years here?

A. Not in that particular business, no. Been working for other people, running work for other people.

Q. But it has always been in the building trades line, has it?      A. That's right.

Q. What specific type of building trades are you best acquainted with, that is to say, carpentry, plumbing?

A. Carpentry, plumbing, electrical, general building.

Q. Have you since your inception of the business here that you built any buildings around the Fairbanks area?      A. Several, yes.

Q. Would you name several of them?

A. Well, I was carpenter foreman on the News-Miner Building. [11]

Mr. McNabb: What was that now?

Mr. Waxberg: News-Miner Building, carpenter foreman.

Q. (By Mr. Hepp): What is that, the Lathrop Building?      A. Lathrop Building, yes.

Q. I see.

A. Put up KFAR transmitter station, crash station out at Ladd Field, gas station number one, N. C. Garage. Of course, that is burned down now. Several other buildings around town here I have been foreman on and some of them I put up in my own business.

Q. I see. Are you presently in that business?

(Testimony of A. E. Waxberg.)

A. I am.

Q. Do you have any bids, work along that line this summer?      A. Yes.

Q. What is your principal, if any, projects?

A. Well, I just got the Nenana School the other day.

Q. You are going to construct the Nenana School, are you?      A. That's right.

Q. In terms of money what size, what size of building is that, how much money will that cost?

A. Three hundred thirty-five thousand was my bid.

Q. About a third of a million?

A. That's right.

Q. Do you know the defendant, Mr. Hill, Rudy Hill?      A. I do.

Q. Do you know his wife, Mrs. Mary Hill?

A. Yes. [12]

Q. How long have you known them, or either of them?      A. Since about 1949, I guess.

Q. Have you ever had any business dealings with Mr. Hill?      A. Yes.

Q. When, when did you first discuss any business dealings with Mr. Hill, if you recall?

A. Well, as I recall it was in December of 1949 down at my office.

Q. That is down there on—(Interrupted)

A. Wendell and Lacey, yes.

Q. Wendell and Lacey?      A. Yes.

Q. Are you acquainted with a building now known as the Polaris Building?

(Testimony of A. E. Waxberg.)

A. Well, I know where it is and I know the building, yes.

Q. What is the street address of that?

A. First and Lacey.

Q. Where is your business in relation to that?

A. Within a half a block.

Q. Half a block which way?                      A. Down.

Q. Down Lacey Street?

A. Right at the end of Lacey Street.

Q. You are down near the river?

A. Right next to the river, yeah. [13]

Q. You say that you discussed some business with Mr. Hill along in December of 1940, would you state the date again, please?

A. I believe it was in December, 1949.

Q. What was the subject matter of your discussion with Mr. Hill?

A. Well, it was about the possibilities of putting up a FHA building on his property.

Q. Which property was that?

A. Well, this was between First and Second and facing Lacey Street.

Q. Is that the site where the present Polaris Building is now situate?

A. Yes, part of it, yes.

Q. At that time, was there any building on that property?

A. There was some wanigans on there, I believe.

Q. Who was present if you recall in your office when you first discussed the subject matter of Mr. Hill building a building with you?

(Testimony of A. E. Waxberg.)

A. I believe William Berklid was there at the time. I don't know if he was in on the discussion but he knew that Mr. Hill was there.

Q. He was around?

A. Yes, he was around there.

Q. Would you state the substance of that conversation that you had with Mr. Hill that you recall?

A. Well, as I recall it was the possibilities of finding [14] out what a building, how a building should be constructed and what the approximate cost would be and so on and so forth.

Q. Was there any discussion about finances at that time?

A. Well, we would try to get an FHA mortgage or loan and he was to put up his property and all I was to have to do with was to promote or to help the engineering of the building and the, see that the specifications were right and so forth and then to construct the building. That was what we finally come to. That wasn't at that particular time.

Q. Did you have later discussions following this first one with Mr. Hill?

A. Yes, from time to time.

Q. What were the frequency of those discussions, I mean would they occur rarely or often?

A. No, they were quite frequent, oh, until, well, the last was almost continuous, I should say.

Q. I see, as a building contractor, Mr. Waxberg, in that field are building contractors interested in



(Testimony of A. E. Waxberg.)

the financing of buildings which they may be interested in building?

Mr. McNabb: I object to that as calling for a conclusion, no part of the issues in this case.

Mr. Hepp: I believe, your Honor—(Interrupted)

The Court: He may answer.

Mr. Waxberg: I believe so, yes. As far as I know they are. I have seen it happen several times.

Q. (By Mr. Hepp): As a result of these discussions you had with Mr. Hill [15] or that he had with *was*, was there any agreement formed between the two of you?

A. A verbal agreement, yes.

Q. When did that occur, sir?

A. Well, I would say that it more or less grewed as we progressed with the deal. I was led to believe that I was going to do the building of this. All we had was a mutual understanding and he kept calling me from time to time. He would be in Seattle, he would call me to do this and ask me to do that and I naturally thought that and he led me to believe that we were going to put the building up together.

Q. Now, Mr. Waxberg, you are familiar with the practice of people desiring to construct things to send out invitations to bid to supply cost figures and what you as a builder for instance would construct a building of given specifications?

A. Yes.

Q. Did that occur in this transaction with Mr. Hill?

A. No.

Q. Did he to your knowledge ever send out any

(Testimony of A. E. Waxberg.)

invitations to bid this in to different contractors?

A. No.

Q. What is this, in the nature of a negotiated price then as distinguished from a bid price, I don't quite understand?

A. Well, it is a, as a builder he came to me. He came to me as I am a builder and he didn't know how the building should [16] be constructed or what would be the best thing to do and so on and so forth, so he asked me to help him with the various things. They hired an architect in Seattle. This architect was not familiar with Fairbanks area at the time and Mr. Hill asked me to come down to Chiarelli and Kirk was the architects name and to discuss the matter with them. In the first place, we didn't know what the building would cost. We knew what the FHA would allow, which was, I believe, one million six hundred some odd thousand. I forget just what the figure was, but anyway, we had to design the building in such a manner that the price that we could build it for that price and that is the part that I had to see about, what the plumbing would cost and the structural steel and the cement and everything that went into the building, see whether it could be built for that amount of money.

Q. But following this understanding then with Mr. Hill, is it your testimony that you proceeded to supply information as requested to these Seattle architects in order that the building might be designed and costs for it accurately determined?

A. Yes.

(Testimony of A. E. Waxberg.)

Mr. McNabb: I am going to object to that question as leading and suggesting.

The Court: In some measure. It may stand.

Mr. Waxberg: I worked with the architect all the time. Mr. and Mrs. Hill were in the architects office discussing the building. [17]

Q. (By Mr. Hepp): In Seattle?

A. In Seattle.

Q. You were there also?

A. I was there, yes, sir.

Q. Up at this end, Mr. Waxberg, what did you do specifically among other things to compile the information that was necessary for this architect?

A. Well, about the first thing, Mr. Hill was in Seattle as I recall, he phoned me and wanted me to get a drill down on the ground as, to, for the foundation, what would be required for the foundation of the building.

Q. Is that what is commonly called a drill log?

A. Drill log, yes, sir.

Q. Would you explain to the jury what a drill log is?

A. A drill log is, they drill and test the ground and see if it is gravel in the sand or muck. What depth you have to go to get a footing for a building of that kind, which I hired Williams Equipment Company to do that.

Q. Who hired Williams Equipment Company?

A. I did.

Q. Do you know what the charges were for that service?

(Testimony of A. E. Waxberg.)

A. In going over, I couldn't—(Interrupted)

Mr. McNabb: Just a minute. I object, I object to what the charges were. [18]

The Court: He may answer if he knows.

Mr. Waxberg: I believe it is Four Hundred Seventy dollars. I have been going over the papers here recently. It would be impossible for me to remember these figures if I hadn't gone over the papers here recently as no one could.

Q. (By Mr. Hepp): Did you ever pay Mr. Williams for doing that work? A. I did.

Mr. McNabb: I object to that as not the best evidence. Move that the answer be stricken.

The Court: It may stand.

Q. (By Mr. Hepp): What other, if any, work did you do or have done in order to supply these architects with the needed information?

A. Well, under the similar circumstances I had Edgar Phileo make a, take a survey of the ground and adjacent buildings and make a plot plan which was agreed by Mr. Hill. He asked me to get this work done.

Q. Did you then hire Mr. Phileo to make these surveys?

A. Yes, through Mr. Hill. May I enlarge upon that?

Q. What were the names of the architects in Seattle that you spoke of?

A. Chiarelli and Kirk.

Q. A firm of architects that operate in Seattle?

(Testimony of A. E. Waxberg.)

A. That's right, which Mr. Hill contacted to begin with.

Q. Mr. Hill contacted?

A. I didn't contact them until Mr. Hill had discussed it with them several times. [19]

Q. You spoke of having gone to Seattle. Do you recall the number of trips, if there were more than one, that you made to Seattle in connection with this building project?

A. I made three or four trips.

Q. What was the principal purpose of your making these trips?

A. Mostly in discussing the construction of the building with Hill and the design of the building with the architects and also helping with getting an estimate up to present to the FHA.

Q. Was an estimate presented to the FHA?

A. It was, yes.

Q. Was a commitment issued?

A. There was.

Q. Who were the sponsors, if you know, of the FHA commitment that was first issued?

A. Mr. Hill and Mrs. Hill and myself.

Q. Would you state to the jury what a sponsor is?

A. Well, it is co-venturer, I would say, and that is about as close to it as I can come.

Q. Now, you have set forth in your complaint, Mr. Waxberg, that you paid one L. Orsini five hundred dollars. Who is Mr. Orsini?

(Testimony of A. E. Waxberg.)

A. Well, he is an accountant in Fairbanks at the time. I don't believe he is here now.

Q. Well, what was the nature of the services, if any, that he performed for you? [20]

A. Well, he was, he was preparing some financial statements for me as well as he did practically all the paper work in getting this FHA mortgage to the point that it got. If it hadn't been for his paper work why I don't know, I wouldn't have gotten very far at it either because I didn't know a thing about it. He helped to compile the figures.

Q. Did you ever pay Mr. Orsini any money for his services?

A. Well, yes.

Q. How much did you pay him?

A. I believe it was five hundred dollars.

Q. Concerning now the preliminary matters which would necessarily attend the start of a project like this and FHA commitment, was there anything necessary to do that you hadn't done in connection with this project of Mr. Hills?

A. No.

Q. The commitment was issued by the FHA then, I believe you testified and you done all the acts necessary in order to bring that about?

A. That's right.

Q. Did Mr. Hill know anything about building buildings when he first came to you?

A. I don't believe so.

Q. As gathered from your discussions?

A. I don't believe so.

(Testimony of A. E. Waxberg.)

Q. Did he ever make any statement to you that caused you to believe that he did know? [21]

A. Well, he knew what a good building was, naturally. He knows what a good building is. He has been around construction work. I don't know how much he has worked at it.

Q. Did you build this building for Mr. Hill?

A. No.

Q. Why not?

A. Well, to put it in plain words, I was kicked out.

Q. By whom?

A. I would say by Mr. Hill.

Q. When did this occur, sir?

A. Well, it was down at Seattle. He, he, oh, he, he kicked me out and I think Orsini had something to do with it, too. Orsini was kicked out, so was Chiarelli and Kirk, all of us at the same time.

Q. Was this after an FHA commitment had been had?

A. That's right.

Q. Did you ever learn the reason why Mr. Hill dismissed you?

A. No, I have never gotten the reason for it yet.

Q. Where were you at the time when your first information came concerning this dismissal?

A. In my office here in Fairbanks.

Q. Had you had any discussions in connection with the dismissal down in Seattle?

A. No, it was, I never did. Not at that time. That was the first I heard of it was in my office.

(Testimony of A. E. Waxberg.)

Q. Were there any other contractors that discussed this matter with you at that time? [22]

A. Well, yes, there was a Mr. Slater came from—(Interrupted)

Mr. McNabb: Just a minute; just a minute. I object to that as being not material to the issues in this case.

The Court: I don't believe the question is very certain. I am going to sustain the objection.

Mr. Hepp: I will withdraw the question.

Q. (By Mr. Hepp): Did you ever have a conversation with Mr. Hill wherein he elaborated on the original agreement between you in connection with the price of this building? A. Yes.

Q. Where was that discussion and when, please?

A. Well, that was in Seattle.

Q. Whereabouts in Seattle?

A. In the New Washington Hotel.

Q. Who was present at that time, sir, and what date, if you remember?

A. Oh, I don't know. It was the first part of May and Larry Orsini was in my room at the time.

Q. Was Mr. Hill there? A. Yes.

Q. You were there?

A. That's right. Mrs. Hill was there also.

Q. Mrs. Hill was there also?

A. That's right. [23]

Q. What was the general subject matter of that discussion?

A. Well, it was a matter of, as I say it or as I saw it why I was to leave money in the building.



(Testimony of A. E. Waxberg.)

In other words, what they call the kick-back, which goes into this deal between builder and owner and FHA deals. There is all kinds of that stuff going on as you people may be well aware of this.

Q. That's right, just address your statement.

A. And that was put to me and I didn't feel that I would have to do that.

Q. In substance, what was, did Mr. Hill make a proposal to you concerning some money to be returned?

A. Yes, it was fifty thousand dollars is what another contractor had offered Mr. Hill as a kick-back and that was put to me that I should do that or else the thing would be off.

Q. If I understand you right, in other words, of the FHA money that was coming on the job fifty thousand dollars that would go to you would be paid over instead to Mr. Hill?

A. That's right, paid over to Mr. Hill instead of me. You see the FHA allows a certain amount, certain interest rate for a contractor's fee and I didn't know at the time because the plans had never been completed. All we had was preliminary drawings. Just enough to get the FHA commitment is all we had, preliminary drawings. It would be impossible for me to know whether there is ten thousand, five thousand or a hundred thousand dollars profit. It is the idea of getting the building built. And I knew I was safe up to as far as within fifty thousand dollars at least. [24] Well, when the demand is made that I kick back fifty thousand dol-

(Testimony of A. E. Waxberg.)

lars, I couldn't see it. There is where—(Interrupted)

Q. You refused Mr. Hill's proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?

A. That's right.

Q. Is that when you were dismissed, Mr. Waxberg?

A. Yes, that is when Mr. and Mrs. Hill left my room and I never saw them after that for months. I tried to contact them but I couldn't get yes or no out of them.

Q. Have you, were you at that time and since ready, willing and able to perform your agreement with the Hills in constructing that building?

A. I was any time that the plans would have been completed so that I could give a definite figure, I was ready to go and able to go.

Q. Do you know whether a building was ever constructed on these premises? A. Yes.

Q. Do you know who constructed that building?

A. S. S. Mullen.

Q. Where is Mr. Mullen from?

A. Seattle, I believe.

Q. Mr. Waxberg, I notice that you mentioned the dates of around the first of the year, that is to say, December and January of 1950 and then May. Now, was that May of the same year, 1950?

A. Yes. [25]

Q. In the construction business, Mr. Waxberg, what usually occurs, what type of activity are con-

(Testimony of A. E. Waxberg.)

structors, contractors that is to say such as yourself, what type of activity if any during those months?

A. Well, that is generally the busiest time of the year.

Q. Why is that?

A. Well, mostly all of these government contracts are being let at that time.

Q. They are being let through those early spring months? A. That's right, yes.

Q. Did you have any opportunity while you were working on Mr. Hill's project to bid in or figure out and bid in other projects?

A. No, I didn't. I dropped everything for this because I figured this was a sure deal.

Q. This was a sure deal. Did you have a good year, 1950, sir?

Mr. McNabb: I am going to object to that as having no bearing on the issues.

The Court: Sustained.

Mr. Waxberg: Yes. May I get that clear, your Honor.

The Court: The answer will be stricken and counsel will proceed.

Mr. Waxberg: I didn't understand what you said.

Mr. Hepp: I don't think he understood. [26]

Q. (By Mr. Hepp): You didn't bid on any jobs?

Mr. McNabb: I object to that as having no bearing on the issues.

Mr. Hepp: Your Honor, I believe he has a right to show if he was damaged by not being able to

(Testimony of A. E. Waxberg.)

perform his contract or agreement with Mr. Hill.

The Court: I don't believe, counsel, that is a measure of damages. I will sustain the objection.

Q. (By Mr. Hepp): On your trips to Seattle, Mr. Waxberg, who paid for the Pan-American, or how did you travel?

A. I traveled by Pan-American.

Q. Who paid for those trips? A. I did.

Q. Have you ever been reimbursed for any of that money? A. No, I have not.

Q. Where did you stay when you were in Seattle on these different trips?

A. Oh, various places. I stayed in a—(Interrupted)

Q. Excuse me. Did you stay in hotels or did you stay in private homes?

A. Well, I stayed in hotels and auto courts. I stayed in the same auto court with Hills for two different times while I was down there.

Q. Did you eat out, that is eat in restaurants and cafes? [27] A. Yes.

Q. Mr. Waxberg, who paid for your meals and your hotel rooms? A. I did.

Q. Have you ever been reimbursed for any of that? A. No.

Q. Was it necessary to employ taxicabs and other forms of commercial transportation in and around the City of Seattle? A. Well, yes.

Q. Did you employ taxicabs and other forms of transportation? A. I did.

Q. Who paid for that employment?

(Testimony of A. E. Waxberg.)

A. I did.

Q. Have you ever been reimbursed for any of that? A. No, I haven't.

Q. Do you know how much the plane fare for each trip was to Seattle and back at the time that you went there on Mr. Hill's business?

A. Well, something over two hundred, two hundred fifteen, seventeen, something like that. I got the copy of the cancelled checks in my office. I could bring up here.

Q. It has been some years since you have filed this complaint, has it been, Mr. Waxberg?

A. How's that?

Q. It has been some years since this matter originally started? [28]

A. Oh, yes, I don't know, it has been two and a half, three years ago.

Q. Could it have been in the spring of 1950?

A. It might, could have been. I guess it was. I don't remember now.

Q. At the time when you, did you, did you sign a copy of the second amended complaint in this?

A. Yes.

Q. And certify it was true. At the time when that was prepared did you have the figures accurately in your mind and memory of your expenditures?

A. I believe so, substantially correct, yes.

Q. Would you care to review a copy of the, the court's complaint to refresh your memory since it has been some years?

(Testimony of A. E. Waxberg.)

A. It would be a help.

Mr. Hepp: Does the Court have its file here?

The Court: I have just sent the file out. Mrs. Wann can get it.

Q. (By Mr. Hepp): Would you open that file to a paper called the second amended complaint.

A. Well, I can set and look at this paper all day and I would never be able to remember all the figures anyway, if you are going to ask me what all the figures are.

Q. Mr. Waxberg, were they correct at the time they were put in there? [29]

A. I would say substantially, yes.

Q. It was fresh in your mind was it, at that time? A. Yes.

Q. How many days of your services did you spend in behalf of this project with Mr. Hill?

Mr. McNabb: I object to that on the grounds it is too vague and indefinite.

The Court: Ask him if he knows. Sustained.

Q. (By Mr. Hepp): Do you know how many days you spent?

A. Forty-three days. I just got through reading it.

Q. What is the reasonable value, Mr. Waxberg, of services of a man in your position?

Mr. McNabb: Object to that as not the best evidence.

The Court: He may answer.

Mr. Waxberg: I would say a hundred dollars a day.

(Testimony of A. E. Waxberg.)

Q. (By Mr. Hepp): If you know, is that the regular price that is charged in this area for services comparable?

A. Comparable to that, yes.

Q. And you state that you spent forty-three days all told? A. That's right.

Q. In the service of the defendants. Did you ever go any place other than Seattle in connection with this business of Mr. Hill's?

A. Went to Juneau one time. [30]

Q. I see, what is at Juneau in connection with this business? A. Juneau, Alaska?

Q. Yes.

A. FHA Headquarters for Alaska.

Q. Oh, I see. The FHA Headquarters for Alaska is in Juneau? A. Yes.

Q. Did you go there for the purpose of discussing any business for Mr. Hill?

A. I went with Mr. and Mrs. Hill and Chiarelli of Chiarelli and Kirk went, too.

Q. Whom did you see in, what office did you go to in Juneau?

A. Well, to tell you the truth I, I didn't go to any office. I went there, Mr. Hill and Mrs. Hill took care of all the business.

Q. What was the purpose of your accompanying them?

A. Well, in case some question should come up as I get it from Mr. Chiarelli. We were both asked to go along.

Q. You were asked to go along as consultant?

(Testimony of A. E. Waxberg.)

A. In case there would be any questions come up.

Q. I see. How long did you stay in Juneau?

A. I believe it was overnight.

Q. Mr. Waxberg, on page five of your amended complaint, which you filed in this cause you have alleged that you expended the sum of six hundred fifty-two dollars, five cents for airplane fare in connection with this work, is that figure correct, sir.

A. Well, that should be—(Interrupted) [31]

Mr. McNabb: I object to that as being not the best evidence. No proper foundation laid for it.

The Court: The witness has said he doesn't know that he has his records in the office. I sustain the objection. Mr. Hepp, this might be an appropriate time for a recess. Members of the jury, once again I admonish you not to converse with any person or among yourselves concerning the case at trial, and do not express any opinion until the case is finally submitted to you. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:05 p.m., the Court took a recess until 3:15 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Parties wish the jury polled or do you wish to stipulate they are all present?

Mr. Hepp: We will stipulate that they are all present.

Mr. McNabb: We will stipulate.

The Court: Very well. You may proceed.



A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

Q. (By Mr. Hepp): Mr. Waxberg—(Interrupted)

Clerk of Court: Plaintiff's Identification No. 1, No. 2, No. 3, and No. 4 and No. 5. Plaintiff's Identification No. 6 and No. 7. [32]

(Statement dated February 1, 1950, was marked Plaintiff's Identification No. 1.)

(Statement from Dolman Hotel dated 1950 was marked Plaintiff's Identification No. 2.)

(Statement from Baranoff Hotel was marked Plaintiff's Identification No. 3.)

(Statement from New Washington Hotel, Seattle, was marked Plaintiff's Identification No. 4.)

(Statement from New Washington Hotel, Seattle, was marked Plaintiff's Identification No. 5.)

(Statement from Orsini & Associates was marked Plaintiff's Identification No. 6.)

(Statement from Williams Equipment was marked Plaintiff's Identification No. 7.)

Q. (By Mr. Hepp): Mr. Waxberg, I show you Plaintiff's Identification No. 1, ask you to examine it, see if you know what it is, please?

A. That is correct.

Q. What is it, sir?

A. Well, this is a bill that I paid at the trailer

(Testimony of A. E. Waxberg.)

court where I was staying when Mr. and Mrs. Hill were staying at the same place.

Q. What is the date on that, sir?

A. This is February 1. [33]

Q. Of what year? A. 1950.

Q. I show you Plaintiff's Identification No. 2, ask you to examine it, please.

A. This is a copy of a bill where I stayed at the Dolman Hotel in Seattle and it is dated 1950 in the amount of, oh, there is several.

Q. Is that bill marked paid?

A. This is marked paid, yes.

Q. Did you pay it? A. Yes.

Q. You say this is a copy?

A. This is just a copy of it.

Q. How does it come that there is a copy of this?

A. Well, I didn't keep a lot of those bills, I don't keep the hotel bills. I pay the bill and probably stick it in my shirt pocket and lost and for that reason I called in or wrote to them rather and asked for a copy of the time that I stayed in the hotel.

Q. I show you Plaintiff's Identification No. 3, examine it, please, and state if you know what it is.

A. This is a bill from the Baranoff Hotel marked February 4, 1950, in the amount of nine dollars. That was when I was in Juneau with Hills.

Q. Did you pay that bill, sir?

A. It is marked paid and this is, this is an original. [34]

(Testimony of A. E. Waxberg.)

Q. It is one that didn't get into your shirt pocket?      A. That's right.

Q. I show you Plaintiff's Identification No. 4, ask you to examine it, please?

A. This is a bill from the New Washington Hotel. It dates from March 8th to and through March 15th in the amount of eighty-eight dollars, sixty-five cents.

Q. Is it marked paid?

A. Of which I paid, yes.

Q. I show you Plaintiff's Identification No. 5.

A. This is a bill from the New Washington Hotel again covering the dates from March, just March 1st and 2nd and on through the, in the amount of seventy-seven dollars, eighty-six cents of which I paid.

Q. Did you pay that?

A. Yes. However, this is a copy also. It was written, sent to me 3-12-51.

Q. I show you Plaintiff's Identification No. 6.

A. This is a bill from Orsini and Associates, Inc., dated April 10, 1950 in the amount of five hundred dollars which I paid and it is for professional services January 1 through March 31st, 1950, preparation of financial statement, cost estimate and related matters pertaining to your sponsorship of FHA commitment No. 130-42016.

Q. Plaintiff's Identification No. 7. [35]

A. This is a bill from Williams Equipment Company dated June 7, 1950. I don't know why the

(Testimony of A. E. Waxberg.)

delay but it is for drilling, thaw-testing and so forth for the drill log that we obtained.

Q. How much is that bill, sir?

A. It is four hundred seventy dollars.

Q. Did you pay that? A. I did.

Q. Have you ever been reimbursed any part of the moneys that you have expended?

A. No, I have not. Not a dime.

Q. Did you ever have any receipts for cabfares?

A. Well, yes.

Q. What kind of receipts do you get?

A. Oh, receipts. I thought you said need for.

Q. Receipts for cabfares? A. No, I never.

Q. How did you pay for your cabs?

A. Generally cash. I never got a, I never got a—(Interrupted)

Q. Did you get receipts for your meals, sir?

A. No.

Q. How did you pay for them if at all?

A. Cash.

Q. I would like to go into a little bit at this time, Mr. Waxberg, repetitiouswise, this agreement that you had, do you [36] recall the figure, the value of the building, that is the preliminary figures of the cost of this building prior to or at the time when the FHA was first approached for a commitment. What was the value of that building if you know, preliminarily?

Mr. McNabb: Object to that as being not the best evidence, calling for a conclusion.

The Court: The Court is going to sustain the

(Testimony of A. E. Waxberg.)

objection. You have asked about the value of the building. There has been no building in evidence.

Mr. Hepp: I will rephrase the question.

Q. (By Mr. Hepp): What was your calculations or yours and the architects calculations as to the cost to FHA or to Mr. Hill of the building that is proposed or is the subject matter of this agreement you have been testifying?

Mr. McNabb: I object to that as calling for a conclusion, no proper foundation laid for the testimony, not the best evidence.

The Court: He can state if he knows. You may proceed.

Mr. Waxberg: I am quite sure, I am sure it was one million six hundred ninety-four thousand three hundred seventy-four dollars. That was the FHA commitment within a dollar or two.

Q. (By Mr. Hepp): Now, figuring back from a cost of construction, what margin, what amount of money if you know would that give to the [37] contractor in accordance with your calculations submitted at that time?

A. Well, with what information—(Interrupted)

Mr. McNabb: Just a minute; just a minute. That question is not within the issues in this case. The answer to it is not within the issues. It has no bearing on this case whatever.

Mr. Hepp: Your Honor, I think it is a measure of damages.

The Court: I believe I know what counsel is trying to develop, but I feel that I must sustain the

(Testimony of A. E. Waxberg.)

objection at this time. There has been no proper foundation laid for the question.

Q. (By Mr. Hepp): Mr. Waxberg, did you calculate the cost of construction of this building which was submitted to the FHA at the figure of one million six hundred ninety-four thousand three hundred seventy-four dollars. Did you calculate the construction costs of that building?

A. I did as far as I could with the preliminary drawings we had at that time, yes.

Q. Now, subtracting those construction costs from the cost of the building, that is to say one million six hundred ninety-four thousand three hundred seventy-four dollars, what difference in terms of money would there be?

A. Well, at the stage that the drawings were completed at the time that we arrived at a figure, I had it figured at about [38] fifty thousand two hundred eighty dollars, or three hundred forty dollars, somewhere in there, would be contractor's fee at that time. However, the drawings were not completed so I could not come up for a completed building because I was kicked out of this deal before the drawings were completed. You must remember that.

Q. That is as near as you can calculate to the extent that Mr. Hill allowed you to go, would that figure be your losses as anticipated profits in building this building?

Mr. McNabb: I object to that, no proper foundation, no showing that he knows.

(Testimony of A. E. Waxberg.)

The Court: The Court is obliged to sustain the objection. I believe it is highly speculative in view of what the witness has already stated. The objection is sustained, Mr. Hepp.

Q. (By Mr. Hepp): Mr. Waxberg, do you know what the builder's profit would be on that building?

A. I believe, it was—(Interrupted)

Mr. McNabb: Just a minute, same objection, speculation.

Mr. Hepp: Your Honor, this man has testified that he calculated these costs and he knows these figures. I don't know who would be in a better position to know what anticipated profit would be made than a builder himself that figures the job.

The Court: Mr. Hepp, there is no doubt about the importance of this matter, but I don't believe that this witness is yet qualified to speculate or to testify as to the profit that might have been lost by him when he has not yet stated that [39] the plans were completed and the building was agreed upon, the type of construction. He says the plans were incomplete. Now, how can he testify as to the expected profit? I sustain the objection.

Q. (By Mr. Hepp): Mr. Waxberg, what does the FHA allow percentagewise as a builder's profit?

Mr. Nabb: I object to that as having no, move that the answer be stricken on the grounds it has no bearing on the issues of this case because it is a, does not represent profit on a job as something allowable.

The Court: The Court is going to sustain the ob-

(Testimony of A. E. Waxberg.)

jection because the Court feels there would be no proper foundation laid for a contract as yet.

Q. (By Mr. Hepp): Going back, Mr. Waxberg, I believe you testified that you entered into an agreement with Mr. Hill? A. Yes.

Q. By agreement, what do you mean?

A. Well, it was a mutual agreement that I was to be the builder and he was to be the owner of the building and I was to get for my risk and my share of the profit would be what the FHA allows which is six per cent on the total amount of the commitment. See in other words, the builder's fee, which is standard all over the country, is six per cent of the commitment. [40]

Q. You mutually agreed with Mr. Hill, now there must have been more to it. What was all contained in that agreement, if anything more?

A. Well, that I was to help promote the building and help to get the plans completed and, which I did everything I could. We got the commitment.

Q. Was there any time set for the completion of this building?

A. As I recall it was about fourteen months that I agreed that I would put the building up in from the time of the commitment.

Q. Do I understand that any time within fourteen months or fourteen months?

A. Within the fourteen months.

Q. You could have put it up in eleven months, that was within the terms of your agreement?

A. That's right.



(Testimony of A. E. Waxberg.)

Q. Was there any other part of that agreement, were you going to invest any money into the building, Mr. Waxberg?

A. Well, yes, I was to leave, providing the money was made, to leave fifty thousand dollars for Mr. Hill's use and he could pay me back at any time that it was convenient. We hadn't made any agreement as to when the payments or how the payments were going to be made, but as I recall he wanted that money to put in a bar down in the basement of this deal and I agreed that I would leave fifty thousand providing there was that much and he could [41] pay me so much a month. We never come to any agreement as to how that was to be paid back. However, the rest of it I was to get cash.

Q. Do you know, Mr. Waxberg, what six per cent of one million six hundred ninety-four thousand three hundred seventy-four dollars is?

A. Well, it is roughly a little over a hundred thousand.

Q. Now, I believe you testified that there was some talk about a fifty thousand dollar kick-back offer made to you, has that got anything to do with this fifty thousand you are talking about now?

A. Now, that is an entirely different thing. That kick-back would mean that I would never get the fifty thousand. I would just naturally give it to him. That wasn't the agreement that I had. The agreement that I would leave fifty thousand.

Q. Well, can you state the date which you state

(Testimony of A. E. Waxberg.)

that this agreement was had? That is, these negotiations culminated in a meeting of the minds and a mutual, I think you said a mutual agreement, what date was that, Mr. Waxberg?

A. Well, about the, about the first time I went to Seattle. I believe it was in January, 15th or the 25th or somewhere in there.

Q. Was that the first trip to Seattle?

A. That first trip to Seattle I had the assurance that if the building was, if we could get the FHA commitment that I would be the builder of it. [42]

Q. You mean the agreement was conditioned upon that?

A. Well, yes, we hadn't even applied for the commitment at that time. We worked together from January 15th and on through and it was February or some time when we got the commitment. When we got the commitment I was all through. They didn't kick me out before that though.

Q. I understand that. I believe we have gone through that, Mr. Waxberg. When did you arrive at this figure of one million six hundred ninety-four thousand three hundred forty dollars that was arrived at with the FHA?

A. That was arrived at in the architects' office. We got that figure from plumbing companies, steel companies, various supply houses. Mr. Chiarelli helped compile those figures. We worked together on it. There was other fellows involved, too, like heating engineers and so on and so forth.

Q. Mr. Waxberg, in your experience as a build-

(Testimony of A. E. Waxberg.)

ing contractor, are drill logs and surveys necessary for architectural plans to be drawn on a building such as the one that Mr. Hill contemplated building at that time?      A. Yes.

Mr. McNabb: I object to that as no proper foundation having been made, no showing that he knows, no showing the purpose for which they would be required.

The Court: I will permit the answer. I concede that the type of building, if any, is very indefinite. He may answer. [43]

Mr. Waxberg: Well, I have never heard of, I have been in the construction business for years and years and I never heard of a building being constructed without finding out what kind of soil or what kind of foundation. I have been, most every government agency has to have a plot plan indicating, even on a FHA home you have to show the surrounding area. That I know.

Mr. McNabb: I object to that answer, move that it be stricken on the grounds that it isn't responsive to the question. Not within the issues.

Mr. Waxberg: Then I misunderstood the question.

The Court: It is ordered stricken. Maybe we will have the question read or rephrased, just as you like.

Mr. Hepp: I will rephrase it.

Q. (By Mr. Hepp): What type of building, what was the subject matter of your agreement with Mr. Hill, what type of building?

(Testimony of A. E. Waxberg.)

A. Concrete.

Mr. McNabb: I object to that as having no bearing on the issues of this case. I think it is supposed to be preliminary to the question he asked previously. At this stage it is not relevant.

Mr. Hepp: Your Honor, I don't know how you would show what type of footings were necessary unless you show what type of building.

The Court: He may answer. [44]

Mr. Waxberg: It was an apartment building built out of concrete, a concrete apartment building.

Q. (By Mr. Hepp): Single or multiple story building?

A. Multiple story, seven story building I believe it was.

Q. Does the construction of such a building require a showing of what was under the ground for the purpose of determining the type and size of footings to support that?

A. It certainly does.

Mr. McNabb: Just a minute. I object to that and move that the answer be stricken on the grounds that at this stage of the proceedings we are not discussing the building as such and the answer to the question is not material, and I move that it be stricken.

The Court: It may stand.

Q. (By Mr. Hepp): I believe you testified that you hired some findings, some drill logs?

A. That's right.

(Testimony of A. E. Waxberg.)

Q. Were those findings of service, of value to Mr. Hill?

Mr. McNabb: I object to that as calling for a conclusion.

The Court: He may answer.

Mr. Waxberg: The findings were, yes, they were. The commitment was based on, that is part of what the commitment was [45] based on. It was approved by the FHA.

Q. (By Mr. Hepp): Can you state the reasonable value, Mr. Waxberg, of your services to Mr. Hill in connection with the preliminary surveys, all that work that you did which he profited by, if any, up to the point of FHA commitment?

Mr. McNabb: Object to that as being not the best evidence, calling for a conclusion.

The Court: He may answer.

Mr. Waxberg: Well, yes, I feel that I lost out in many ways by spending my time on this particular project.

Q. (By Mr. Hepp): We are now talking about the value of services to Mr. Hill as set forth in your third cause?

A. Well, it is certainly worth a hundred dollars a day for my time that I spent on it.

Q. How many days did you spend?

A. I believe it was forty-three days.

Mr. Hepp: You may question the witness.

Mr. McNabb: Are you reserving, Mr. Hepp, your offer of these identifications purposely? It is all right if you are.

(Testimony of A. E. Waxberg.)

Mr. Hepp: I believe we have until the close of the case. There may be more. We didn't want to take up the Court's time.

The Court: Very well, very well. [46]

### Cross Examination

Q. (By Mr. McNabb): Now, Mr. Waxberg, when was the first time that you discussed a building with either Mr. or Mrs. Hill?

A. As I said before, it was some time in December of 1949.

Q. You don't recall? A. In my office.

Q. You don't recall the day?

A. No, I don't recall the day. It was in—(Interrupted)

Q. Do you know why they came, or who came to you? A. Mr. Hill.

Q. Mrs. Hill did not accompany him?

A. No.

Q. Was anyone else present at that meeting?

A. I believe Bill Berklid was.

Q. Was there anyone else present there?

A. I don't remember.

Q. Prior to the time that you had that meeting with Mr. Hill had you had a conversation with anyone at all concerning the possibility of Mr. Hill's building, or constructing or having constructed a building? A. No.

Q. At that time had you ever discussed the construction of a building for Mr. Hill with Mr. Orsini? A. No.

(Testimony of A. E. Waxberg.)

Q. What sort of a building or type of a building was discussed at that December meeting? [47]

A. This apartment building.

Q. Where was that to be located?

A. It was to be located facing Lacey between First and Second.

Q. How many streets was that building to face on? A. Three streets.

Q. How deep was it to be, east and west?

A. I don't remember the figures other than I know it is longer on the First Street side than on the Second Street side and it was to cover the full of Lacey.

Q. Now then, for the purpose of the record, was that building ever constructed? A. No.

Q. Was a building even similar to that one ever constructed? A. No.

Mr. Hepp: I object to that unless counsel defines what he means as similar.

The Court: The witness has answered.

Q. (By Mr. McNabb): How many stories was that building to be, Mr. Waxberg?

A. That was a seven story, I believe.

Q. Was it to have a basement? A. Yes.

Q. How much of a basement?

A. Well, it was over the full area. [48]

Q. What sort of a building was it to be, business, office, or what sort? A. Apartments.

Q. How many?

A. And business on the first floor.

Q. I beg your pardon, I'm sorry.

(Testimony of A. E. Waxberg.)

A. Business on the first floor and apartments on the upper floors.

Q. How many apartments were there to be in the building?      A. I don't remember.

Q. Now, is that the only building that you ever discussed with Mr. Hill?      A. Well, yes.

Q. You did not discuss with him the construction of any other type building?

A. Well, we discussed several types, I presume, when we first started out, but this was the conclusion of it.

Q. Now, I am talking to you about, at the first meeting. That is the only thing I am interested in right now?

A. No, I think there was a different building. I believe Mr. Hill had a preliminary sketch that, oh, let's see, that Alaska Architectural had made up for him.

Q. What sort of a building was that, sir?

A. As I recall, it was a concrete building.

Q. How large a building was it to be? [49]

A. I don't remember because we didn't go into it very far.

Q. So at the first meeting you did not in fact discuss the construction of an apartment building facing on First, Lacey and Second, but you discussed a building that the preliminary plans of which were drawn by Alaska Architectural Engineering Company?

A. That's right. I don't remember what that



(Testimony of A. E. Waxberg.)

drawing was because I believe I only saw it one time.

Q. Now, did you discuss the financing of that building?

A. Of the, it would be that Alaska Architectural brought?

Q. That's right.

A. I don't recall. I don't think so.

Q. What sort of a building was it, do you have any recollection at all?

A. I have no recollection because that was put aside practically right away because we, I don't remember it.

Q. Now then, did you discuss FHA financing at the time of the first meeting?

A. That I don't recall.

Q. Did you discuss money at all?

A. I don't even recall that.

Q. When did you get to the stage of the proceedings to commence discussing money?

A. Well, there was several meetings and I don't remember just when they, I think some time in January when Rudy, I had nothing to do with the financing in the first place. Rudy was [50] to look after that. That was his phase of it, that is what he was going to do and he wanted me to do the building. The financing I had nothing to do with.

Q. Do you now have any recollection of Rudy going to San Diego over the holidays in that very year to visit with his children and then coming back to Seattle?

(Testimony of A. E. Waxberg.)

A. I, yeah, I have a recollection of that, yes.

Q. Now, then, do you have any present recollection of your discussions prior to the time that Rudy went outside of building a business building with an RFC loan?

A. There may have been. There was quite a few, there was quite a few proposals as I recall. I don't remember. I don't remember those things.

Q. And in fact the plans that were prepared by Alaska Architectural and Engineering, that was in fact plans for a business building, was it not?

A. I don't remember.

Q. Could have been though?

A. It could have been, yes.

Q. Do you now recall that the plans or the drawing that was in fact prepared by Alaska Architectural Engineering was nothing at all like the building as it was figured to front on First, Second and Lacey?

A. That's right, as I remember it wasn't that kind of a building. [51]

Q. It was something entirely distinct, was it not? Now, you say at this time you do not now recall the number of units that were to be included in the big building? A. No, I don't remember.

Q. You do recall, Mr. Waxberg, that you testified under oath by stipulation between Mr. McNealy and me on the 8th day of May, 1952, at, from 2:15 p.m. on that afternoon, do you not?

Mr. Hepp: Just a minute. I object to any questions put concerning that matter. I don't think it

(Testimony of A. E. Waxberg.)

is relevant, pertinent. It is not before, in the issues here. That was not filed. As a matter of fact, the rules were breached when it was taken. We object to any reference being made to it at all.

The Court: The Court has been wondering about the interrogatories that might have been taken. I see no action taken on it.

Mr. McNabb: Oh, there is another matter of interrogatories which may be reflected by the file, your Honor, but I am talking about a stipulation in which Mr. Waxberg testified at a deposition.

The Court: May I see the stipulation you refer to.

Mr. McNabb: Well, it never was filed but that does not alter the fact that the testimony was taken and it was under oath in the presence of Mr. McNealy and myself.

The Court: What was the nature of the stipulation?

Mr. McNabb: That the deposition might be taken. [52]

The Court: Was the deposition taken for use in this case?

Mr. McNealy: If the Court please, I recall it has been a couple years or so ago. I don't remember that we had a signed, I don't believe that there was a signed stipulation. I think there was an agreement between Mr. McNabb and I that Mr. Waxberg's deposition could be taken and in fact was taken and I was present when it was taken in Mr. McNabb's office and I was present. However, since there were no preliminaries arranged as I re-

(Testimony of A. E. Waxberg.)

member in regard to objections or any formal parts made to the deposition I don't believe that it was ever signed by the defendant here, but it definitely was—(Interrupted)

The Court: Well, the Court will permit no reference to a purported deposition unless counsel lays the proper foundation by the filing of the proper papers, stipulations and so forth, so the Court will know whether or not it was properly taken on notice or on agreement. There is nothing in the original file unless counsel can point it out to me that clarifies the matter.

Mr. McNabb: For the purpose of the record, your Honor, I would, I don't know that it is particularly important at this time, but I would like to get it stated now once and for all that without a stipulation Mr. Waxberg would not have appeared at my office. Without a stipulation Mr. McNealy would not have appeared at my office. Without a stipulation Mr. Waxberg would not have answered the questions that were propounded to him nor would [53] a stenographer have been present who took the matter in shorthand, nor certainly would we have gone to the time and the trouble and the expense of typing the deposition which Mr. Waxberg did not refuse to sign, but which he just didn't sign and I have the certificate of the stenographer who took the deposition and I can certainly produce Mr. Parrish who swore the witness before any of his testimony was taken. I think it is all quite abundant from what occurred that the deposi-

(Testimony of A. E. Waxberg.)

tion was taken and without objection.

The Court: Well, it seems to the Court that if counsel during the trial is going to rely on a deposition that it should be made a part of the original Court file. I have gone through the file carefully and I found interrogatories to defendant and I found a motion that evidently has never been taken care of and I find no deposition in the file of this particular witness, the plaintiff. If counsel wishes to get the file in order the Court will permit it.

Q. (By Mr. McNabb): Mr. Waxberg, you did, when did you finally become aware of the number of apartments or the number of units to be placed in the building?

A. I believe upon the return of Mr., when Mr. and Mrs. Hill returned from San Diego or from south, they stayed at this auto court, they phoned me to come down to Seattle and they had then, or they then had a preliminary drawing of this apartment in [54] Chiarelli and Kirk's office as I recall it. That is the first time that I knew that Chiarelli and Kirk was in it, was making up the drawings. Now, I may be wrong for that, that is just about the way it was.

Q. You say then when you went out the preliminary plans were prepared?

A. They were, they had been prepared by Chiarelli and Kirk to a, well, just a rough, very rough preliminary plan and then later on as time when on why we got them to a point to where we could present them to the FHA for a commitment.

(Testimony of A. E. Waxberg.)

Q. And how many apartments were there to be in the building?

A. I don't remember. This was five years ago and I was kicked out of the deal and I have got other work to do than to remember that.

Q. Do you recall when you went out?

A. I believe it was the latter part of January, 1950, 29th or thereabouts.

Q. The 29th of— (Interrupted)

A. Thereabouts.

Q. Of January?

A. I think so. Maybe it was earlier than that. I don't remember. I was out there three or four times. My hotel bills indicate the date that I was out there.

Q. Well, how long, how many days did you go out before you reached an agreement to the construction of this building? [55]

A. I believe I was out there fourteen days one time.

Q. Was that the first time that you were out or the second time or do you have any present recollection?

A. I believe it was the second time.

Q. That you were out fourteen days?

A. I believe it was fourteen days I was out one time. Three or four days another.

Q. But the only way that we can establish then the first trip, the date of the first trip that you made out is by the hotel bill?

(Testimony of A. E. Waxberg.)

A. The date that I was down there. I would say it was.

Q. Well, do you recall where you stayed that first time?

A. I believe I stayed in this auto court the first time. I am not sure, or was that, no, I can't remember.

Q. Let me ask you this, Mr. Waxberg, are these receipts for all of the hotel bills that you had in connection with the trip?

A. I believe so. I might not have them all there but that is all that I found anyway, that I have any record of.

Q. Well, the first one that I can find here is the motor court, Munson's Motor Court and it is dated the 1st of February as rental from January 29 to February 1 inclusive. Do you believe that to be the first trip that you made out?

A. May I ask a question?

Q. Sure.

A. When is that one from the Baranoff Hotel in Juneau, when is that dated? [56]

Q. Oh, that is February the 4th.

A. In Juneau. Well, then, it must have been one previous to that then because I spent more time between the time that we went to Juneau than two days. That I know.

Q. Plaintiff's Identification No. 2 shows a date in May, hotel bill. Plaintiff's Identification 4 is a hotel bill showing a date as March the 1st. Plaintiff's Identification 5 is a hotel bill, March the 12th.

(Testimony of A. E. Waxberg.)

Identification 3 is Juneau, the Baranoff, February 4; and No. 1 is an auto court in Seattle, I take it. February 1st. Now, you have no earlier receipt, do you now, then believe that your January 29th trip was the first one?      A. Must be.

Q. And at the time that you went out on the 29th of January that was the first time that you could have seen any plans or any specifications at all for the building?

The Court: I don't know that the witness understood that as a question. It was sort of a statement. Were you thinking?

Mr. Waxberg: I was thinking. I was trying to recollect on that deal. It just doesn't tie in. That is, because I spent a considerable time on those drawings before, before we went to Juneau and according to this Juneau bill why we were there February 4th and I don't believe that that commitment was issued and I am just wondering if that Juneau bill belongs to the deal at all. [57]

Q. (By Mr. McNabb): Fact of the matter is that it doesn't belong in it at all?

A. Well, I don't know.

Q. It was way late in February when the plans were taken to Juneau, wasn't it?

A. It seems to me that that's right.

Q. Because the 608 expired on the 28th day of February and you got there right at the deadline?

A. That's right.

Q. So that the 4th of February couldn't possibly be part of this deal, could it?



(Testimony of A. E. Waxberg.)

A. No, I don't think so. That is what I was thinking about because it doesn't, I don't know how that bill, I don't even recall being in Juneau on that date when it comes right down to it. That is why I couldn't answer your question because this doesn't make sense.

Q. Now, you know Al, it was late in February before you ever went to Juneau with the plans?

A. I know it. At least as I recall it was, yeah.

Q. I think by refreshing your memory we can tie this thing down very tight in that regard because you must have a recollection that the 608 expired late in February and you had to hurry like mad to get there?

A. I believe it was some time in March that we were in Juneau. [58]

Q. Now then, in that regard, having refreshed your memory to that extent, do you now believe that the 29th of January was your first night in Seattle?

A. I believe it was about the first time.

Mr. McNabb: May we then, your Honor, have a recess.

The Court: Yes, I ask that the jury heed the admonition previously given and we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:55 p.m., the Court took a recess until 4:05 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: The parties have both stipulated as to the presence of all persons in the jury box.

A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further cross examination.

Q. (By Mr. McNabb): Now, Mr. Waxberg, have you refreshed your memory as to a possible earlier trip than that indicated by the, or earliest receipt that we have?

A. Oh, I believe in January or the first of February was the first trip.

Q. And was that then, that is the 29th day of January if the receipt is correct, the first opportunity that you had had to talk to Mr. and Mrs. Hill? [59]

A. No, I don't think so. I think we were, we talked about this building quite some time before they left here.

Q. Well, I know, naturally. My question was not proper in that regard, but the first opportunity that you had had to see them since they went outside just shortly before Christmas?

A. I believe so.

Q. In other words, they did not return to Fairbanks, did they?

A. I don't believe they did.

Q. And you had not gone outside? A. No.

Q. Consequently it, just to be sure now, did you stay at any other place besides this one, I mean

(Testimony of A. E. Waxberg.)

on the first trip out, other than that motor court, Munson's Motor Court?

A. Gee, I don't remember.

Q. Then to the best of your recollection at this time the first time you saw Mr. and Mrs. Hill after they went outside was on the 29th day of January of 1950?

A. Probably the first time I saw them. However, I talked to them over the phone several times.

Q. And that was the first time that you had been able to see the preliminary drawings that had been prepared by Chiarelli and Kirk?

A. Well, they were by no means complete when I saw them.

Q. On the 29th they were not complete? [60]

A. On the 29th. They weren't even, not more than started. An outline of them is what it was as I recall it.

Q. Do you now know, Mr. Waxberg, the number of apartments, apartment units that were to be in the building?

A. No, I don't.

Q. Had any plans or drawings been forwarded to you as a result of the Hills presence in Seattle and your presence in Fairbanks?

A. I don't recall that there was.

Q. Your recollection at this time is then that the first time that you saw any sort of drawing in reference to an apartment building is on or about the 29th day of January?

A. As I recall it, yes, sir.

Q. Did you agree to construct an apartment

(Testimony of A. E. Waxberg.)

building without having seen even any preliminary plans for it?

A. I might as well, I might say yes because the whole essence of the whole deal was the FHA would allow so much money and it was a matter of getting a building constructed for that price. It had to be designed so that it could come under that amount of money and we worked quite some time before we got it to where it could be constructed for that amount of money and a profit made. I certainly wouldn't go down to Seattle without having some kind of an agreement or Rudy Hill would not come to my office and discuss this thing if he didn't have something, if he didn't have intent that we should work together on it. [61]

Q. Mr. Waxberg, do you know what the maximum amount that the FHA would allow per unit in a multiple story apartment building?

A. They have, it was three different prices. I know there was, or two different classified classifications of apartments and they had a different amount set up for each one, but I can't remember those figures. This is five years ago.

Q. Now, did they, do you know or did you then know? A. I did then know, yes.

Q. What the maximum amount was that they allowed, that the FHA allowed?

A. I did at that time, yes.

Q. Had you talked to the FHA people prior to the 29th of January?

A. That was, Mr. Hill had done that.

(Testimony of A. E. Waxberg.)

Q. He had done that?

A. He had done that.

Q. Do you know whether they had a minimum amount per unit that the FHA would grant?

A. Well, as I recall it they had a minimum square foot basis that you could work on.

Q. Per unit?           A. Per unit, yes.

Q. But that, of course, has nothing to do with dollars per unit? [62]

A. Well, yes, it was based on dollars per unit as well. So many square feet for so many dollars is what they would allow.

Q. Yes, I know, but do you know whether they had such a thing as a minimum amount that they would grant?

A. No, I don't believe so.

Q. Was there any element of chance or element of risk in securing an FHA commitment to build a building or is it just a matter of putting in an application and you get the commitment?

A. No, you have to come up with a piece of property and a certain amount of money along with this commitment in order to get it.

Q. Let me ask you this, do you know whether, or did you at that time know whether or not the FHA might allow something less per unit than their maximum?           A. That I don't know.

Q. For construction?           A. I don't know.

Q. Did you know it at that time?

A. I think I knew all about it at that time, yes.

Q. Did you not know then that the, that, that

(Testimony of A. E. Waxberg.)

there was a great deal of difference between putting in an application for an FHA commitment to build a building for a particular price and the amount that the government or the FHA might back or guarantee for the construction of it?

A. Well, this figure of one million six hundred some odd [63] thousand dollars were for some apartments of different types and I know that the figure was agreed upon by the FHA, but I don't remember the number of apartments or the kind, maybe there was two hundred or ninety. I don't remember which.

Q. Now, you tell us that you had not seen Mr. Hill between the, some time in December prior to Christmas of 1949 and the 29th day of January, 1950?

A. Well, that is just an assumption. I couldn't swear to that because that is a long time ago. When you ask me a question like that I can't say yes or no on it.

Q. When you say that the FHA agreed to something, are you talking about the commitment that was actually issued?      A. Well, yes.

Q. They did not agree, or the FHA people did not agree to anything prior to the time that the commitment was issued, did they?      A. No.

Q. Fact of the matter is, they agreed with a great many reservations in their commitment dated the 24th day of February?

A. Well, all the figures were compiled then as to the various costs and it was approved by the

(Testimony of A. E. Waxberg.)

FHA and the FHA man, let's see, what is his name.

Q. Staple? A. Staples, that's right.

Q. And his office is where? [64]

A. His office was in Juneau and with the man at the head of it in Seattle had talked it over with Mr. Hill and Mr. Chiarelli that the, that the different costs as they were supposed to be set up on the form that they have was O.K. and for that reason we all went to Juneau.

Q. And you went to Juneau when?

A. That I don't remember. It must have been in March.

Q. In March?

A. It must have been, or right after. I think that that commitment was back dated if the truth was known on it. We couldn't get under the gun on it as I remember. I may be mistaken on that because we were working against time so close. I don't remember if it was the 24th or the 25th that the FHA was to cease to exist and we had to meet that and now I don't remember if it was back dated or what.

Q. You have no recollection now at all of when you went to Juneau?

A. I would have to check my airplane ticket or something.

Q. And how many trips did you make to Juneau? A. Just the one trip.

Q. Well, now, we have a receipt from the Baranoff dated the, the 4th, the 4th day of February, 1950; were you down there on other business?

(Testimony of A. E. Waxberg.)

A. If I did, I don't remember it. I was traveling around quite a little bit. I don't recall being in Juneau. [65]

Q. For what purpose did you go to Juneau?

A. Well, it was for this commitment.

Q. Did you take the application with you at that time?      A. Mr. Hill had it.

Q. Mr. Hill made that trip, did he?

A. Yes, he did.

Q. Who else went along?

A. On, Mrs. Hill, myself, Chiarelli and I believe Mr. Sumter.

Q. What else did you take with you at that time?      A. Who else?

Q. What else, an application?

A. An application and the drawings.

Q. An application for a loan from FHA, is that what it was?

A. Well, it was some drawings for their approval.

Q. Well, was there any other paper work involved in the thing besides just the drawings?

A. Well, the application and the breakdown on the cost of the job and so forth.

Q. Those were taken up on that trip on the 4th then?

A. If it was the 4th, yeah.

Q. Fourth of February?

A. If it was the 4th. I don't know whether it was the 4th or not. It is the only trip that I recall Hill and myself and Mr. Sumter and Mr. Chiarelli



(Testimony of A. E. Waxberg.)

went. Now, what day that was, I don't know. [66]

Q. Well, we have the receipt and you made only one trip?

A. Well, I only made one trip with them, yes, and for this application. I might have made another trip. This particular deal that you are asking me about is, I don't know the date. What I am trying to imply is that I know that I went with Hills and Mr. Sumter and Mr. Chiarelli for the sole reason to obtain an FHA mortgage for this building, but what date I don't know.

Q. Do you think that this, that the trip that is represented by the receipt from the Baranoff Hotel dated the 4th of February is not the trip that you went with those named persons?

A. I tell you I don't know. Could be. It couldn't be.

Q. Let us assume at the moment that it was not that trip. Do you have any recollection of what plans and specifications for the building were submitted with the original application?

A. Well, it was the plans that were put out by Chiarelli and Kirk and the preliminary specifications. That I know.

Q. Do you have any recollection of the number of pages of drawings? A. No.

Q. Would you recognize the drawings if you saw them?

A. Yeah, I imagine I would unless they worked on them after I last saw them.

Clerk of Court: Defendant's Identification A.

(Testimony of A. E. Waxberg.)

(Drawings were marked Defendant's Identification A.) [67]

Q. (By Mr. McNabb): Now, I believe you testified on direct examination that not only you but Chiarelli and Kirk and Orsini were all fired?

A. That's right.

Q. As quickly as the commitment was issued?

A. That's right.

Q. So it was— (Interrupted)

A. I was told by Chiarelli. That is how I found out, really. I came down to Chiarelli's office to discuss it, to discuss the building and he had told Mr. Chiarelli not to discuss the building with me any further.

Q. At any rate that is what Mr. Chiarelli told you? A. That's right.

Q. Mr. Hill didn't tell you that, Mr. Chiarelli told you that?

A. Well, I couldn't get ahold of Hill.

Q. I say though, Mr. Hill didn't tell you that, Chiarella told you that?

A. I couldn't get Hill to tell me that.

Q. So it therefore follows that Mr. Hill didn't tell you? A. Well, yes, he did.

Q. What did he tell you?

A. When he walked out of the room in the New Washington Hotel he slammed the door and that was it. We are through.

Q. Now, I will hand you Defendant's Identification A, ask [68] you if you know what that is?

A. Well, this is not the drawing that, this is,

(Testimony of A. E. Waxberg.)

oh, yes, I guess it is at that. These are the drawings, yeah.

Q. Do you believe those to be the drawings that were submitted to the FHA with the application or a copy of them?

A. I would say so. As I recall it now, yes, sir.

Q. Now, that then is a copy of the original specifications that were submitted at the time of the application?

A. The drawings. The specifications, no.

Q. These are not the specifications?

A. No. The specifications had stated what the different kind of materials to be used, plumbing.

Q. Did you notice how many pages there are there?

A. No, I didn't count them.

Q. Just for the purposes of the record, will you state how many pages there are?

A. This is seven. Sheet No. 7.

Q. These are what you commonly refer to as preliminary plans?

A. That is what I would call preliminary plans, yes.

Q. And apparently if these plans were submitted to the FHA on the 4th day of February as we must, I believe, assume, you had had only about five days to examine and work on those preliminary plans?

A. Oh, I wouldn't say the 2nd or the 4th day of February. It couldn't be because the commitment as I recall ended February 24th and we were work-

(Testimony of A. E. Waxberg.)

ing against a deadline and I am [69] quite sure that we were, it couldn't have been February 2nd because we were working on a definite deadline on it. I remember that.

Q. Well, what do you believe the facts to be?

A. I believe the facts to be that we rushed up there with as little as we possibly could get by to get this commitment made under, before the FHA ceased to function. Now, if we had to have those drawings or even less drawings to get this commitment through why the FHA building would never have been sanctioned. This building or that building or any other building if we hadn't got under the gun.

Q. Well, when do you believe the plans were delivered, with the application or not?

A. The plans were delivered with the applications, yes.

Q. And you say that you went with them to Juneau?      A. That's right.

Q. At the time that the application was submitted?

A. Yes, I did but I took no part in that.

Q. Well, I know, but the evidence is that the only time that you were in Juneau was the 4th of February?

A. Well, I, in other words you are trying to say that I wasn't never in Juneau or on the 4th.

Q. I am not trying to say anything. I just want to get the facts straight. What are they?

(Testimony of A. E. Waxberg.)

A. Well, if it was the 4th the commitment was issued, it was the 4th that I was there. [70]

Q. You were there in Juneau on the date that the commitment was issued?

A. Well, at the time that Mr. Sumter, maybe, I don't know when it was. I know it was in February some time or maybe it could have been even possibly the first of March.

Q. Well, how much time expired between the date of the application and the date of the issuance of the commitment?

A. That I don't know.

Q. Well, it wasn't just a matter of a few days, was it?      A. That I don't know.

Q. You have no recollection at all?

A. I know, I wasn't following through on that. In fact, when I came into Juneau that time I didn't go back to Seattle. Mrs. Hill went back to Seattle and Mr. Sumter and I come back up here to Fairbanks and that is the last that I knew of until I knew I was kicked out. I went back figuring everything was O.K. and some time, quite some time later why I found out that I was kicked out of the deal and then I made another trip to Seattle but that date I don't recall. I can produce it if it is necessary.

Q. Well, Mr. Waxberg, I don't like to belabor the point but I am trying to establish if we can whether or not you were present in Juneau with Mr. and Mrs. Hill on the date that the application was submitted to the FHA?      A. I was.

(Testimony of A. E. Waxberg.)

Q. You were there?

A. I was there with Mr. Chiarelli as well. [71]

Q. How many trips did you make to Juneau?

A. One trip is all I can recall.

Q. We have established that date by the Baranoff receipt.

Mr. Hepp: Now, I object to that, the inferences under that. This witness hasn't stated he identified that money having been paid to the Baranoff. He has stated he is not certain that is the trip. I think counsel has gone past that point.

The Court: You may proceed with the cross examination but I think the jury understands that the witness was first definite as to the receipt and now he is indefinite but you may proceed.

Q. (By Mr. McNabb): But you only made one trip to Juneau anyway?

A. As I recall. I may have made two but I don't remember.

Q. Well, now, Mr. Waxberg, will you testify that the first trip that you made to Seattle was on the 29th of January?

A. Well, that I don't know. I was working on this thing from start to finish but, or start to where I dropped off.

Q. Will you testify that you made a trip to Seattle prior to the 29th of January.

A. No, I don't know for sure.

Q. Did you ever see a copy of the application for the loan?

(Testimony of A. E. Waxberg.)

A. I saw a copy of what I understood was the application for a loan, yes. [72]

Q. Do you know who prepared it?

A. No, I don't.

Q. You do recall who went to Juneau on that trip?

A. Mr. Sumter did.

Q. Well, Mr. Chiarelli had nothing to do with applications for loans, did he? He was the architect?

A. Yes, he was the architect. He was the architect. He made it possible that the application could be filled out and submitted, as well as I am part of that, too.

Q. Do you believe Mr. Chiarelli made out the formal application for a loan?

A. No, I don't.

Q. Do you have a present opinion as to who did make the application, make out the formal form?

A. No, I don't.

Q. You don't have any opinion at all in that regard?

A. Know who made the application out?

Q. Yeah.

A. Well—(Interrupted)

Mr. Hepp: Just a moment, I am going to object to that as argumentative. This witness said he didn't know who made the application out. I think that answers the question. Counsel is trying to get an answer here that he is trying to make something out of.

(Testimony of A. E. Waxberg.)

The Court: Did Mr. Hepp make an accurate statement? [73]

Mr. Waxberg: I believe so.

Q. (By Mr. McNabb): Do you know why Mr. Sumter went along on that trip?

A. Well, he was working with Mr. Hill all the time and he works, operates the Washington Mortgage Company and I don't know what connection there was there.

Q. Did you ever know?

A. Well, I probably did at that time. I know Mr. Sumter runs a bonding firm and he was, took an active part in all the FHA projects going at that time. That I know.

Q. He was working with Mr. Hill?

A. Yes, I was in Mr. Sumter's office several times.

Q. Why were you in Sumter's office?

A. Well, pertaining to this FHA deal.

Q. What part did Mr. Sumter play; what did you; did he ask you questions? Let's start here. Why did you go to Sumter's office?

A. I don't know. I don't remember now. I was in there in Sumter's office with Mr. Hill as I recall a time or two. Now, I don't remember exactly what we were in there for.

Q. A time or two?

A. I believe it was a couple of times.

Q. That is all that you ever called on Mr. Sumter?

A. There might have been more. I can't remem-



(Testimony of A. E. Waxberg.)

ber. That is four years ago, five, whatever it is.

Q. Now, you were in, right in the middle of this thing all the way from the first preliminary discussions in your place in December clear up until the commitment was issued?

A. More or less. I wasn't taking care of, I was spending most of my time with Mr. Chiarelli and various material outfits and so forth.

Q. Do you know how many applications were made for a loan prior to the time that the commitment was issued?      A. No, I don't.

Q. Do you know whether there was more than one application made or not?

A. No, I know there was, one application made with my name on it and that was the first one.

Q. When was that made?

A. Well, that I don't recall.

Q. Do you know whether there was any applications made that did not have your name on them?      A. That I wouldn't know.

Q. Do you know whether the commitment when it was issued had your name on it?

A. That I wouldn't know.

Q. Do you know whether a commitment was ever issued?

A. Well, yes, a commitment was issued.

Q. How do you know that?

A. Well, I found that out through various sources. [75]

Q. Did you ever see it or a copy of it?

A. I haven't seen the commitment, no.

(Testimony of A. E. Waxberg.)

Q. Well, you alleged in your complaint that your name was on the commitment, that you and Mr. Hill were partners or joint-venturers or something?

A. We were and we were supposed to.

Q. But you don't know now whether or not your name was even on the commitment, is that true?

A. I don't know what you are trying to prove. I would be frank with you if I knew what you were trying to prove.

Q. Well, I just want to know whether to your knowledge your name was on the commitment when it was issued?

Mr. Hepp: I am going to object to that unless he says as a sponsor or as a recipient or what? I don't think counsel's question is clear, name on a commitment.

The Court: I think he can answer whether or not he knows.

Mr. Waxberg: My name was on the commitment as a sponsor. R. P. Hill and Waxberg. The first commitment ever issued on that building.

Q. (By Mr. McNabb): Do you know the date it was issued? A. No, I don't.

Q. And you do not know how many applications were made but you do know that the one that you saw had your name on it?

A. The first application that was made my name was supposed [76] to be on it and was on it.

Q. You saw a copy of it? A. Yes.

Clerk of Court: Defendant's Identification B.

(Testimony of A. E. Waxberg.)

(Application for Mortgage Insurance was marked Defendant's Identification B.)

Mr. Hepp: May it please the Court, we would like to look at that Identification before any questions are put on it.

The Court: Very well.

Q. (By Mr. McNabb): Mr. Waxberg, I will show you Defendant's Identification B, ask you if you know what that is?

A. It is an application for mortgage insurance.

Q. Is that a copy of the one that you saw or the one that you saw? A. Very likely is.

Q. What is the date on that application, Mr. Waxberg?

A. This is January 31st, it looks like this.

Q. That appears to be the application, does it?

A. Yes.

Q. That date corresponds rather closely to your arrival in Seattle and subsequent trip to Juneau?

A. It appears to but I, I wouldn't be too sure about this deal. No, I don't think so. I don't think this is the one that went to Juneau. It is nothing that has been signed by Juneau. [77] No, I don't think so. I don't think that is the paper.

Q. You don't think that is what paper, Mr. Waxberg?

A. I don't know. I don't remember but I don't believe that, I can't believe that that is the paper that was dated January 31st, 1950, that that is the one that went to Juneau.

Q. Let me ask you this if Mr. Sumter and Mr.

(Testimony of A. E. Waxberg.)

Hill and Mrs. Hill will testify that that is the one and the only one, will you say it isn't?

Mr. Hepp: Now, I object to that, your Honor.

The Court: Sustained.

Mr. Hepp: Highly speculative. Don't answer it.

Mr. McNabb: Nothing speculative about that. It is quite simple.

Mr. Waxberg: That is the application all right. I don't think that is the date. We had all kinds of forms like that that we are filling out. I remember one time we went into the National Bank of Commerce. We had a big discussion there. We had a paper like that.

Q. (By Mr. McNabb): Who was with you that trip?

A. Mr. Hill, Mr. Orsini, I believe, and I am not so sure but what O. V. Selid, Selid Construction, or he was in Seattle at that time anyway. The reason I mention him is because he was giving, he was giving a check of five thousand dollars in some financing on the deal, and I think we had papers like that that [78] we discussed then.

Q. Then just before we recess for the day, will you testify that that is not a copy of the application for an FHA loan that was taken to Juneau?

A. I would not testify that isn't a copy of it. I would testify that I don't believe it is the date that this paper was taken to Juneau, January 30th. I don't believe that that was the day that paper was taken to Juneau.

Q. Well, now, that doesn't necessarily follow

(Testimony of A. E. Waxberg.)

that the date is the same. It wasn't made out in Juneau, was it?

A. No, it wasn't made out in Juneau.

Q. It had to be made out some place before it was taken to Juneau. Now, Mr. Waxberg, did, if your first trip to Seattle was on the 29th or 28th day of January of 1950 you could not possibly have agreed to construct a building for Mr. and Mrs. Hill prior to that time, could you, for a specified amount of money?           A. No.

Q. It isn't conceivable and on the 29th day of January or in the event that it is determined that the preliminary drawings were taken to Juneau at the time the application you as a reasonable contractor would never have agreed to build a building for any amount of money on the basis of such plans, would you?

A. Well, I must have the dates mixed up. I must have gone to Seattle prior to the 29th of January regarding this work because I certainly worked on this job all the way through right [79] up to the time of the commitment and this January 30th don't ring in my mind at all, because I was there in March. I was there in February and I didn't find out that I didn't have anything to do with it until in May.

Q. I know, but now I ask you, you wouldn't have agreed to construct a building on plans like these preliminaries, would you, for any price?

A. It was a matter of estimating whether, we

(Testimony of A. E. Waxberg.)

have spare foot basis, we know how much it costs to run a floor.

Q. Would you have agreed to construct a building, application being made for a million and seven hundred thousand on seven pages of specifications?

A. Where is the specifications that were submitted to Juneau along with this? That is not all of it. You couldn't submit, I hope that the government would not accept a loan on a, a, an application for a mortgage that would be more absurd than me for the government to accept that for to loan one million six hundred thousand dollars.

Q. Seven hundred according to the application?

A. Well, whatever it is, yes. So that definitely can't be all of it. We had the specifications, everything that was to go into the building roughly for them to decide on and we had to have that in order to submit the application, so that is not all of it.

Q. Now then, what you mean is you would certainly have not [80] agreed to construct a building for a specific price on no more plans than those?

A. No.

Q. You wouldn't ever have done that, would you?

A. No, you have to have specifications. That is just some drawings. They are nothing on it outside of an outline of it.

Q. No contractor in the world would have agreed to such a thing, would he?

A. No, and we submitted more. FHA wouldn't even consider an application. Mr. Sumter, I believe,

(Testimony of A. E. Waxberg.)

wouldn't waste his time if that is all we had was that drawing. Would he waste his time to go to Juneau? No. Nor would I waste my time going to Juneau, but that is what you are trying to say, or want me to say, that is all that we had and that I would bid on that.

Q. No, that is not what I wanted you to say, I just wanted you to answer my question. Would you bid on a million seven hundred thousand dollar job on the basis of those plans? A. No.

Q. No other contractor in the world would, would he? A. No.

Mr. McNabb: May we recess, your Honor.

The Court: Members of the jury, once more I admonish you it is your duty not to converse with anyone or among yourselves concerning the subject of this trial, and do not express any opinion thereon until the case is finally submitted to you. [81] This case then will be continued until ten o'clock tomorrow and the Court will recess until nine.

(Thereupon, at 5:00 p.m., the trial of this cause was adjourned until 10:00 a.m., August 2, 1955.)

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., August 2, 1955, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding:

The Court: Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

Clerk of Court: They are all present, your Honor.

The Court: Very well. I believe Mr. Waxberg was on the stand.

A. E. WAXBERG

the witness on the stand at the time the adjournment was taken, resumed the stand for further cross examination.

Q. (By Mr. McNabb): Mr. Waxberg, over the evening did you reflect, were you able to refresh your memory concerning earlier trips to Seattle than the one which we mentioned that occurred on the 28th or the 29th of January?

A. I don't recall any, no. [82]

Q. You weren't able to find any check or anything of that kind? A. No.

Q. Were you able to recall the nature of the building, the original drawings for which were prepared by the Alaska Architectural and Engineering Company?

A. No, I never even thought of it because it was one of the—(Interrupted)

Q. Do you now have any recollection at all concerning the possibility of constructing a building with the use of RFC funds?

A. I don't recall it, no.

Q. You have no present recollection of that?

A. No.

Q. Do you have any recollection of any transac-



(Testimony of A. E. Waxberg.)

tions with Mr. Orsini concerning the opening or the establishment in Fairbanks of a bank?

A. Yes, I do.

Q. I believe that you and Mr. Hill and Mr. Orsini all worked on that project to some extent, did you not?

Mr. Hepp: Now, I object to that, your Honor. It is certainly beyond the scope of direct examination. I don't know how a bank gets into this picture. There may have been numerous conversations but it is certainly not related to the issues here and exceeds the scope of direct examination and for that reason I object to it being brought in as a confusing sideline in this case. [83]

The Court: Perhaps it is true, Mr. Hepp, but it may be preliminary.

Mr. Hepp: I am perfectly willing to listen to counsel's offer to the bench to show its relationship to the issues of this trial.

The Court: The objection is overruled at this time. You may proceed.

Q. (By Mr. McNabb): You do recall that there was such a discussion? A. Well, yes.

Q. And you mentioned yesterday that on one occasion that Mr. Selid was in, was present with you at one of the banks in Seattle?

A. Well, that was, I am not sure about that. I know Mr. Selid put in some money in regard to this bank deal. I don't think it will hurt, I don't think it will do any harm to tell the whole deal about that. Dawson Cooper and Ovie Selid and

(Testimony of A. E. Waxberg.)

myself and I can't think of the fellow's name, he is a flyer here anyway.

Q. Jim Dodson?

A. Jim Dodson, that's right. Well, anyway, we went together and paid toward the building, there was to be a bank on the corner and we paid advanced rent on that and that was to be, the building was to be designed so there could be a bank in the corner.

Q. What corner is that?

A. That is on Second and Lacey. [84]

Q. And do you not now recall that the bank building was to be constructed under an RFC loan. It was a substantially smaller building and wasn't the big apartment building?

A. Oh, no, this was in the apartment building because it was pertaining to this FHA deal and there is where Ovie Selid comes in down at the National Bank of Commerce or whichever bank it was. He issued a check so that Mr. Hill could pay the FHA or the architect for, I forget now which one it was but he used that check that Ovie Selid issued on that and it was pertaining to the FHA mortgage on this particular building.

Q. And Mr. Orsini was in on that transaction, too, was he not; by that I mean he played some part in seeking to establish a bank?

A. Orsini played a big part in promoting the paper work for all on this building.

Q. For the bank I am talking about now?

A. Not necessarily too much, no.

(Testimony of A. E. Waxberg.)

Q. Now, the, do you now recall the number of units that were to be in, the number of apartment units that were to be in this building?

A. No, I don't remember.

Q. Do you recall now where you went after your trip to Juneau that is evidenced by the receipt of February the 4th?

A. I don't know if it was February the 4th or not, but when I left Juneau I came to Fairbanks.

Q. You came to Fairbanks, and when did you return to Seattle?

A. I believe that was some time in May.

Q. You didn't return to Seattle after that?

A. Well, I don't think that, that I am sure that I wasn't in Juneau on February 1. I think that is an error in the bill. I think you will find that that is a duplicate of the bill and it is a clerical error there because I am quite sure that I was in Juneau in March. I am sure of that and there must be a clerical error there.

Q. But you made only the one trip to Juneau?

A. As I recall, yes. I am quite sure.

Q. And the time that you did go there was when the application was made?

A. Not when the application was made. It was when the commitment was issued. There is where I got all confused yesterday. I confused this application with the commitment.

Q. Mr. Waxberg, what would have been the necessity for you to go to Juneau or how even would

(Testimony of A. E. Waxberg.)

you have known when to go to Juneau for the commitment?

A. Well, the FHA man and, in Seattle and also Mr. Sumter went along and Chiarelli and Kirk, and it was all for getting the commitment. We had the figures all compiled at that time so we knew approximately and what the building would cost and if you will note that the application is not the same figure that the commitment was issued on. [86]

Q. Well, it doesn't necessarily follow that it will be, does it?

A. No, not necessarily.

Q. You can put in an application for six million dollars and have a commitment issued for one million, couldn't you?

A. That's right. That is where I got confused yesterday thinking it was a commitment. I was confused on the time that I was in Juneau on account of this.

Q. Let me ask you this, sir, why did you and Mr. Chiarelli, if he went along, and Mr. Sumter, if he went along, why did you go, why did you accompany Mr. Hill to Seattle or to, excuse me, to Juneau?

A. Well, I was on the, I was one of the sponsors of it and my name was on the application and I certainly figured that as well as it might be something come up I thought it was necessary that I be there.

Q. Why did you think, why did Mr. Chiarelli go, if he went?

(Testimony of A. E. Waxberg.)

A. Might something come up in regards to some change or something that Mr. Staples would require to get the commitment.

Q. Why did Mr. Sumter go?

A. That I don't know. He was connected with the, with Mr. Hill some way or other. Now, I don't know. I wasn't paying too much attention to that. I was trying to get the building, the plans and the specifications for it completed and I let Mr. Hill do the other part. [87]

Q. But you believe now that you went to Juneau not at the time that the application was submitted, is that right?

A. That is correct.

Q. But at the time that the commitment was in fact issued?

A. That's right.

Q. Well, let me ask you this, how did you know when the commitment was going to be issued?

A. Well, that I don't recall but certainly we all didn't go up there just on the assumption that it would be, that the commitment would be made. I don't remember just what brought it on but we certainly all didn't go up there just for the trip.

Q. Well, that is reasonable.

A. And I don't remember.

Q. Is it not reasonable, however, thinking back over this situation to assume that the, that the preliminary plans were submitted along with the application, along with the specifications so to speak in accordance with the preliminary plans, that you went there at that time so that if the FHA people in Juneau requested additional information or

(Testimony of A. E. Waxberg.)

needed any changes that then was the time to talk about it, not when the commitment was issued?

A. No, no, that is wrong. Wrong. We didn't do too much talking about this. The FHA had an office in Seattle and most of this stuff was handled through the FHA office in Seattle as far as the preliminary work was concerned.

Q. But the commitment was issued where?

A. In Juneau. [88]

Q. Do you know then who received word that that the commitment was about to be issued?

A. That I don't know. It might have been through Mr. Sumter because he was helping on the promoting of this deal, I'm sure, but I wasn't following that phase of it. I had plenty to do with what I was doing without trying to cover all of it and after all, Mr. Hill was the head sponsor and all I was doing was supporting him in order to get the building going and I was to have no part in the building anyway. I was just the builder so I didn't follow a lot of that.

Q. So it is now your opinion that you didn't go to Juneau at the time the application was made?

A. I don't believe so. I can't recall it if I did. I certainly didn't go to Juneau, no, I didn't, not at that time the application was made.

Q. So then this Baranoff receipt is not accurate, or is it?

A. I don't believe so because I just couldn't have been there at that time.

Q. Well, Mr. Waxberg, look at this receipt now.

(Testimony of A. E. Waxberg.)

It has February the 4th at the top, it has from 2-2 to 2-4 another place and it is stamped paid February the 4th, 1950?

A. I still believe that this is a, well, I don't know. I can't tell you but I feel sure that it wasn't February the 4th I was there. However, that is four or five years ago. It is pretty hard to remember. [89]

Q. Of course, you do know that the commitment was not issued until some time after this, don't you?

A. That I know, yes.

Q. Do you know when the commitment was issued?

A. Somewhere around the 24th or the 25th of February as I recall. The first of March it might have been even in the first days of March. Now, I don't remember.

Q. Did you see a copy of the commitment?

A. I did not, no.

Q. When did you become aware that it had been issued in fact?

A. Well, Chiarelli and I both were told that the application was issued when we were in Juneau. Therefore, I left.

Q. Now, wait a minute, just a minute. Just a minute now. Will you say that again, please. I am sorry. I just wasn't listening. I was thinking about something else. It went over my head.

A. Well, we were told by Mr. Hill or led to believe that the commitment was issued at least, and we know that it was issued and therefore, I

(Testimony of A. E. Waxberg.)

come back up here to Fairbanks to take care of some other stuff that I had to do.

Q. When were you told that the commitment was issued?

A. When we were in Juneau. I never even went to the office of the FHA in Juneau. Mr. Sumter and Mr. Hill and Mr. Staples and Mrs. Hill took care of all of that. [90]

Q. Mr. Hill told you in Juneau that the commitment was issued?

A. I was led to believe that anyway. He must have told me. I can't remember now, but I was led to believe that the commitment was issued.

Q. But you were only in Juneau with Mr. Hill on one occasion?

A. As I recall it was only on one occasion, yeah.

Q. You never did see a copy of the commitment?

A. I did not.

Clerk of Court: Defendant's Identification C.

(FHA commitment was marked Defendant's Identification C.)

Q. (By Mr. McNabb): Now, if the application were submitted when you and Mr. Chiarelli and Mr. Hill, Mr. Sumter went to Juneau, and the application is dated the 31st of January and the commitment was not issued until late in February, Mr. Hill could not have told you that the commitment was issued, could he?

A. How was that again.

Q. I say if the only time that you went up there to Juneau was at the time that the application was



(Testimony of A. E. Waxberg.)

submitted and you were there on the 4th of February apparently, and if the commitment were not issued until as you say late in February, Mr. Hill couldn't have said to you that it was issued, could he?

A. Well, I can't remember the dates. That is entirely [91] possible. I know it was in Juneau with Mr. Hill and as I said before when the commitment was issued. We had all the specifications. We had the preliminary drawings, enough so that the commitment could be issued.

Q. What specifications now are you talking about?

A. Well, there was what the building, how the building was to be constructed, materials and so on and so forth.

Q. Those are the specifications that accompanied the preliminary drawings?      A. Yes.

Q. Did you see a copy of those?

A. Well, yes, I did.

Clerk of Court: Defendant's Identification D.

(Specifications were marked Defendant's Identification D.)

Q. (By Mr. McNabb): I hand you the Defendant's Identification C now, Mr. Waxberg. What is that?      A. Commitment for insurance.

Q. What is the date on that?

A. I guess you will have to show me the date on that. I guess it is on the back side. That is February 24th. It is R. P. Hill and myself, sponsor.

Q. So then?

(Testimony of A. E. Waxberg.)

A. And that is the commitment. [92]

Q. This is the commitment, you know that to be true? A. Yes.

Q. Or a copy of the commitment?

A. A copy of the commitment.

Mr. McNabb: The Court would like to see this?

The Court: You are not offering this?

Mr. McNabb: Not at the moment.

Q. (By Mr. McNabb): Now, I will show you Defendant's Identification D and ask you if you know what that is, please?

A. Yes, this is an outline of the specifications.

Q. Is that a copy of the specifications that was submitted? A. With the application.

Q. With the application? A. Yes.

Q. And were these preliminary drawings?

A. I believe so, yes.

Q. Now then, at the time that the application was submitted, Mr. Waxberg, let me ask you this, according to your present recollection when was the application submitted?

A. I guess it was the first part of February, somewhere in there.

Q. About the time that the application form is dated? A. That's right.

Q. And at that time these specifications were submitted, [93] these are the only specifications that had been prepared and these were the drawings? A. As far as I can recall.

Q. Now, at that time that was just about the time that you went to Juneau, wasn't it?

(Testimony of A. E. Waxberg.)

A. That I couldn't say. I don't, I didn't, I'm quite sure I didn't go to Juneau in the first part of February. It was in March when I was in Juneau or when the commitment was issued when I went to Juneau. As I recall it. I am, I may be all mixed up. This is so long ago that I can't remember dates and just how.

Q. Let me ask you this, do you know whether the commitment which is dated the 24th of February was based upon these preliminary drawings and these specifications?

A. I would say no. The, it was nowhere, this was for the application and the specifications had to be more clear. We had to get to more specific figures than what we had to submit with the application because I worked on that for quite some time with Chiarelli and Kirk before that was worked to a point that the commitment could be issued.

Q. Do you mean by your testimony then that the application, these drawings, these specifications were not sufficient for the FHA purposes?

A. Not all together. Not for issuing a commitment because I certainly wouldn't be working down there for fourteen days or whatever time it was that I was working there with them at that [94] one particular time in order to get the commitment issued.

Q. Do you believe that there was something more submitted to the FHA people than these?

(Testimony of A. E. Waxberg.)

A. Well, there had to be, there was. May I see that paper again.

Q. This outline of specifications?

A. Yes. Yes, there was quite a bit more.

Q. What more was there?

A. Well, there was another form submitted I'm sure of.

Q. What else now, what other form?

A. Well, I don't remember but this, this is just a general outline of the specifications.

Q. Do you think that more specifications than these were submitted?

A. Well, I don't remember but it seemed to me they would have to be. This is just a general outline for the application of the loan insurance.

Q. Now, on the application there is a list of exhibits, were those things submitted, right here?

A. They no doubt were. I don't recollect, but I imagine they were. It is on the list of exhibits.

Q. Do you think that something more than those things were submitted prior to the—(Interrupted)

A. Prior to the commitment.

Q. To the issuance of the commitment? [95]

A. I don't know.

Q. You do not know whether there was anything more? A. I don't recall.

Q. Now then, do you recall when you went back to Seattle after you returned to Fairbanks following your trip to Juneau?

A. Yes, I remember going to Seattle.

Q. But you do not recall when?

(Testimony of A. E. Waxberg.)

A. Well, it was some time after the commitment was issued.

Q. You did not go back then again until after the commitment was issued?

A. No, not that I can remember. It is awfully hard to remember four or five years back.

Q. The commitment shows the date of the 24th of February, does it?      A. That's right.

Q. So it was late in February or very early in March when you went back? Why did you go back down there, Mr. Waxberg?

A. Let's see, that was, well, I am confused on my dates and the time and why I went down there. I know the last time that I went down there is when I found out that I was out of the picture.

Q. I know. Let me ask you though why did you return to Seattle after the commitment was issued?

A. As I recall I heard through the grapevine that I was out of the picture. I went down to find out about it. [96]

Q. Now, it would appear from the hotel receipts that you must have arrived down there on the first of March or the 28th of February?

A. It appears that way.

Q. You stayed at the New Washington according to this bill just two days, March the 1st and March the 2nd. Do you know where you went then?

A. No, I don't remember.

Q. But it would appear from this bill that you went back to Seattle on the 6th. Now, do you know

(Testimony of A. E. Waxberg.)

whether you came back to Fairbanks in that period or where did you go?

A. I don't remember. I was there from the 8th to the 15th according to this.

Q. What did you do on this trip, do you recall, on either one of these trips?

A. Well, I was just working on this, on this particular project.

Q. But the commitment had been issued at that time?

A. Well, that is vague as far as I recall. I was working on it anyway.

Q. Do you know what you did?

A. I was working mostly with Chiarelli and Kirk and I also contacted suppliers and equipment companies and so forth.

Q. Now then, up until the date of the issuance of the commitment which was the 24th of February, you do not now recall [97] when you received notice or word that the commitment had in fact been issued?

A. No, I can't remember exactly on that.

Q. But if we are to believe that you went back to Seattle at the time the commitment was issued, it must have been about the first of March?

A. It could be.

Q. Now, according to the evidence that we have, you were in Seattle on the 29th of January and in Juneau on the 4th of February, and at that time these are the only plans we have, is that true?

(Testimony of A. E. Waxberg.)

A. It must be.

Q. And I believe that you said yesterday that you would not have bid on any job, no contractor would have bid on any job on the basis of such preliminary specifications and preliminary drawings?

A. Well, you must remember that this is not bidding on a job. This is strictly promoting enough plans and specifications in order to obtain an FHA mortgage and this is not bidding on it. It is just helping Mr. Hill get this FHA mortgage is what that, that is all that is.

Q. So actually up to that time you had no firm agreement with Mr. Hill to build any kind of a building, did you?

A. Well, certainly I did. I wouldn't go down to Seattle. I wouldn't have been working on this thing all the time. My name [98] wouldn't be on the commitment or the application if there hadn't have been some agreement and we had to hurry things in order to get under the deadline and if it hadn't been for that application and the commitment issued under the deadline there would be no Polaris Building today because there wouldn't have been an application in for a commitment issued which had been revised after the commitment was issued, I was through.

Q. Mr. Waxberg, the Polaris Building certainly is not the one for which the application was made, is it?

(Testimony of A. E. Waxberg.)

A. It has been revised. It was worked off of the original commitment.

Q. You told us several times yesterday that the application for this building, this building was to front on Second Street, on Lacey Street and on First Street, didn't you?

A. That is very true.

Q. So the Polaris Building is certainly not the one that the application was made for?

A. Absolutely not, but the commitment had been made for a certain sum of money and after I was out of the picture this same commitment was used for a revised building and if the—(Interrupted)

Q. Did you agree to build the building, the Polaris Building as it now stands for what you say here, a million and six hundred thousand dollars?

A. That has nothing to do with it. [99]

Q. Answer my question.

A. State your question again.

Q. Did you agree to build the Polaris Building as it now stands for a million six hundred ninety-four thousand three hundred seventy-six dollars?

Mr. Hepp: Just a minute, I object to the question. It is beyond the issues of this Court. There is nothing set up in the pleadings about the present Polaris Building. This was a claimed breach of contract in accordance with the original specifications and what was later built has no relation to this trial.

The Court: He may answer.

Q. (By Mr. McNabb): Did you?



(Testimony of A. E. Waxberg.)

A. No, I didn't. I wasn't involved in this Polaris Building.

Q. What building did you agree to build for a million six hundred ninety-four thousand dollars?

A. I didn't agree to build a building for any, for, we didn't have any specific figures set at the time.

Q. You couldn't have, could you, Al?

A. Well, no. I was to get six per cent of the commitment for the builder's fee on it and if I could make a hundred thousand on it, O.K. If I only made fifty thousand that was O.K. It would have to be O.K. but that is the reason I was there to see that the building would be outlined and the specifications so that we could construct a building for that amount of [100] money and make a reasonable amount of profit.

Q. At that time did you know the minimum FHA requirements?

A. As I recall I did, yes.

Q. And how did you know them?

A. Well, the FHA have forms and specifications that they issue that you can, to work by. I don't remember what they are now but I recall that they did have.

Q. And in the event that, let me ask you this, is it your statement that the FHA absolutely guarantees a builder a profit of six per cent of the construction cost?

A. They don't absolutely guarantee it. It is allowed the builder and on the application and the

(Testimony of A. E. Waxberg.)

breakdown of the cost and so forth it is set up. It is set up so much for the architect. He gets his fee and the contractor gets his.

Q. What you mean by that is that those amounts are allowable?

A. They are allowable, yes.

Q. But they are not guaranteed, are they?

A. No, they are not guaranteed, no.

Q. Fact of the matter is, when they make a commitment of this type it is to agree to guarantee a loan for construction? A. That's right.

Q. And if you can't build the building for any less than that or if it costs that much without any profit, that is too bad, isn't it? [101]

A. That's right. That is the reason I spent all this time to see that we get a building the specifications and so forth that, so that I could make a reasonable profit.

Q. Or at least make a profit, be able to construct a building?

A. Be able to construct the building and make a profit and we worked to the point of six per cent.

Q. Up to the time that these plans were submitted to the FHA there wasn't any price established, there wasn't any agreement, you were just trying to get something together that the FHA would loan money on, weren't you?

A. That's right.

Q. And consequently you having not gone to Seattle until the 29th day of January, there wasn't the most remote possibility that on the 16th of

(Testimony of A. E. Waxberg.)

January or on the 2nd day of February that you had agreed to construct any building for a million six hundred ninety-four thousand three hundred seventy-four dollars?

A. Well, we knew about how much money that the FHA would allow, but I don't remember how we arrived at the figure on that. That was before I even left here. Mr. Hill and I believe Mr. Orsini and myself had worked on that quite some time before this application was made.

Q. Now, do you now recall the amount of money that FHA would allow as a maximum per unit for an apartment?

A. I can't remember that figure, no. [102]

Q. Do you believe that if I were to call the figure to you that you would recollect it?

Mr. Hepp: Now, I object, purely repetitious, your Honor. He has gone through that point five or six times. I think we ought to go on to more constructive matters.

The Court: I believe it has been explored and I will sustain the objection.

Q. (By Mr. McNabb): Now, Mr. Waxberg, did you ever see the final plans and the final specifications for this building?

Mr. Hepp: I object to that unless counsel defines what building he is talking about.

The Court: I think that is true. We would like to know what counsel means by "this building".

Q. (By Mr. McNabb): The building that you apparently agreed to build?

(Testimony of A. E. Waxberg.)

A. Agreed to build? No, I never saw, I never knew that they were finished. In fact, I believe they were never completed.

Q. They never were completed?

A. I don't believe so, not to my knowledge.

Q. Were they even started to your knowledge?

A. As I recall it, the architect was working on them to complete them and was called off, discharged by Mr. Hill.

Q. Do you know in fact whether Chiarelli and Kirk did anything at all after the commitment was issued? [103]

Mr. Hepp: Now, I object to that. There is no showing before this Court that this witness would know what Chiarelli and Kirk did about any matter. I think it is an unfair question.

The Court: He can answer whether he knows.

Mr. Waxberg: I don't know.

Q. (By Mr. McNabb): What, this is an application which is the Defendant's Identification B. What is the amount of money that was applied for to build the building?

A. One million seven hundred eighty-two thousand.

Q. Do you have any recollection now of what was to be done with the balance of money or the difference between a million seven hundred eighty-two thousand and one million six hundred ninety-four thousand? A. No, I don't.

Q. Do you know why an application was made for a million seven hundred eighty-two thousand?

(Testimony of A. E. Waxberg.)

A. Well, I believe it was based on some apartments and so many types of apartments at a certain price per apartment, but I don't recall. I am quite sure that that is the way it was based. How we arrived at that figure, but I don't recall the figures.

Q. Mr. Waxberg, how did you arrive at the figure of one million six hundred ninety-four thousand three hundred seventy-four dollars?

A. That I don't remember. I was working with Chiarelli and Kirk on that and we worked up those figures, but how we [104] arrived at them now I don't remember.

Q. If on the date of the application a loan was requested of a million seven hundred eighty-two thousand dollars, do you know now why you didn't specify that as the agreed price to build the building?

A. That I can't remember. We were working on it and we got the price to where it is on the commitment. How we arrived at that I don't know. I wasn't following the paper work too much. I was trying to get the specifications, design of the building to where we could make a reasonable profit.

Q. Now then, the figure on the commitment February 24th was the figure that the commitment was issued for?

A. One million six hundred ninety-four thousand two hundred dollars.

Q. Of course, on one we have a variation of about ninety thousand dollars, that is ninety thousand dollars in the price that you allege that you

(Testimony of A. E. Waxberg.)

agreed to build the building for on the application and on the other after the commitment was issued on the 24th of February the price of, the price difference is only in the amount of a hundred seventy-four dollars. Yet prior to the time that this commitment was issued on the 24th of February there is no showing any place that the figure close even to a million six hundred ninety-four thousand dollars was ever even mentioned?

A. I can't remember that part of it. [105]

Q. Is it not possible that this million six hundred ninety-four thousand three hundred seventy-four was arrived at after the commitment was issued? A. I wouldn't know.

Q. Well, that seems reasonable though, does it not? A. I wouldn't know.

Q. You say on the 2nd day of February, that is you allege in the complaint that the figures one million six hundred ninety-four thousand three hundred seventy-four, and just perhaps on that very day or a couple days later when you were in Juneau you submitted an application to the FHA for a figure ninety thousand dollars higher than that, and your name was attached to it.

A. I can't remember what the changes were on the deal and I wasn't working alone on this. I didn't fill those forms out. I was working with the architect and Mr. Hill. We were all working together on it and it is impossible for me to remember what changes took place, or how they took place.

(Testimony of A. E. Waxberg.)

Q. Where were you on the 2nd day of February, 1950?

A. I don't know. I couldn't tell you.

Q. You do know, though, that the preliminary plans are all you had?

A. As I recall.

Q. When did you agree with Mr. Hill to build a building for one million six hundred ninety-four thousand three hundred seventy four dollars? [106]

A. Well, when the application was made or the commitment was issued. I was working, we had an agreement to start off with. That is why I went to Seattle and worked with the architect on this that I was to be the builder and that agreement stood as far as I am concerned.

Q. What was the price that you agreed on?

A. We didn't come to any particular, when we started out we didn't know whether it was going to be two million or three million or what it was going to be. I was to be the builder and we had to promote, we had to get the money from the FHA.

Q. You knew that that was where the money had to come from?

A. Certainly.

Q. That was the only source of funds?

A. That was the only source of funds.

Q. You didn't have the money; Rudy didn't have the money; the only person that had the money was the government and you had to get it?

A. Rudy asked me to help him get it to work with him on it.

Q. Al, what was your agreement if you didn't ever get this thing through. A lot of applications

(Testimony of A. E. Waxberg.)

for FHA loan has gone in and nobody ever, a commitment was not issued, you know that, don't you?

A. I don't know. I know that this commitment was issued.

Q. I know, but what was your agreement if it didn't go? You told me yourself you were working against a deadline. [107]

A. Well, there was nothing said about if it didn't go through.

Q. That wasn't even discussed?

A. No, it was never even talked about.

Q. There was a reasonable possibility that it wouldn't go though, wasn't it? A. Yes.

Q. Something definitely to be considered?

A. That's right.

Q. On the basis of these plans you didn't know whether there would be a commitment for that building or any building; had no assurance?

A. Well, we applied for a commitment, yes.

Q. But you had no assurance at the time you made the application that the thing would actually go through, did you?

Mr. Hepp: I object to further questioning on that, it doesn't seem to be within the issues. The commitment was issued.

The Court: Overruled. He may answer.

Mr. Waxberg: State the question again.

Q. (By Mr. McNabb): I say, you had no assurance at the time you made the application nor actually until the very day that the commitment was in fact issued, that it ever would be?



(Testimony of A. E. Waxberg.)

A. Well, we were more or less led to believe by the FHA that it would be issued providing we could get a, get the [108] specifications and so forth acceptable to the FHA.

Q. Who told you that?

A. FHA man in Seattle told Hill and— (Interrupted)

Q. Were you there at the time?

A. I wasn't there at the time. Mr. Hill was taking care of that phase of it. All I was doing was working with the Architect on the deal, trying to get this thing ready so that it could be submitted.

Q. So the application could be made?

A. Submitted for a commitment.

Q. And actually the commitment was issued where? A. Juneau as far as I know.

Q. And you tell us you didn't even go to see Mr. Staples, the FHA man, in Juneau?

A. Oh, yes, I saw him.

Q. Not at the time the application was issued?

A. I can't remember.

Q. Well, you said yesterday that you didn't even go up to the office, that you were just there?

Mr. Hepp: I object to that as argumentative. All he testified was he didn't go up to his office with Mr. Hill. Now counsel has put words in his mouth and said he didn't even see him.

The Court: That is correct. Sustained. You can ask him whether or not he saw Mr. Staples. [109]

Q. (By Mr. McNabb): Did you see him in Juneau? A. Yes.

(Testimony of A. E. Waxberg.)

Q. Mr. Staples? A. Yes.

Q. Did you discuss the building?

A. Certainly.

Q. What did he say to you?

Mr. Hepp: I object to further questioning as repetitious. We have gone through all that matter yesterday.

The Court: Overruled. He may answer.

Mr. Waxberg: I don't remember the discussion, talking with Mr. Hill, Mr. Sumter, myself and Mr. Chiarelli.

Q. (By Mr. McNabb): Where did that conversation take place?

A. I don't remember if it was in the hotel lobby or, I can't remember but certainly we came to see him and met him.

Q. And you did discuss the building?

A. Obviously must have. That is what we came up there for.

Q. But the big discussion concerning the submission of the application, do you know where that took place?

A. No, I don't. I wasn't interested in that part of it. I was leaving that all up to Mr. Hill.

Q. So you had the discussion that you had with him was merely on a friendly basis as a social proposition, is that right?

A. Well, I wouldn't say that. [110]

Q. What was it then?

A. Well, I was just one of the company and one

(Testimony of A. E. Waxberg.)

of the sponsors and just because I didn't present the papers, why I can't say that I didn't go up there on business pertaining to this building.

Q. Oh, of course not. I think that is rather obvious, but you said yesterday that you didn't go to his office?

A. No, I didn't. Mr. Hill and Mr. Sumter went to his office.

Q. And I am trying to find out now what the nature of the discussion was that you did have with him?

A. I can't remember that.

Q. You don't know or do you know whether he told you that this commitment will be issued?

A. I can't remember that.

Q. Now, Mr. Waxberg, in the second paragraph of your second amended complaint, you say that on or about the 16th of January you agreed to construct a building under 608. Now at that time you were in Fairbanks and Mr. Hill was in Seattle, is that true?

A. That I don't know. I don't know where Mr. Hill was.

Q. Where were you?

A. I was in Fairbanks.

Q. Was Mr. Hill in Fairbanks?

A. I don't remember.

Q. You recall that Mr. Hill went out before Christmas?

A. That I don't remember. You asked me that question yesterday and I, I don't remember. I remember Mr. Hill going out [111] some time and I

(Testimony of A. E. Waxberg.)

met him in Seattle, but when that was, that could have been April or May, I mean.

Q. Do you then now believe that you had a discussion with him or did you agree in writing to construct a building?

A. We had nothing in writing. This is all verbal.

Q. Well then, do you believe that this agreement was entered into by a telephone conversation or an oral agreement during a personal conversation or how, what happened on the 16th of January when you agreed to construct a building under 608?

A. Oh, well, I don't know.

Q. You don't have any present recollection of that?

A. Well, I know I agreed to help him get this FHA deal through and I was to be the builder on it.

Q. Yes, but at that time and even on the 2nd of January, or the 2nd of February you say in accordance with the oral agreement of the 16th of January you agreed to construct a building for a million six hundred ninety-four thousand three hundred seventy-four dollars. Now, apparently you were in Seattle on the 2nd of February?

A. Well, those dates, the, it dates back so far that I just can't remember any of those.

Q. Well now, let me ask you this, this complaint you saw and verified on the 20th day of November of 1951. Now, surely within a year and a half you must have recalled, you must have known then

(Testimony of A. E. Waxberg.)

whether these dates were accurate or not? [112]

A. They should have been substantially accurate, yes.

Q. Now, you say on the 2nd of February you agreed to build a building for one million six hundred ninety-four thousand dollars and your application dated the 31st of January, two days previously and delivered to Juneau early in February was for a million seven hundred eighty-two thousand. Now, I would like you to explain to me how you arrived at one million six hundred ninety-four thousand, which is eighty thousand dollars less or nearly ninety thousand dollars less than the amount that the application was made for?

Mr. Hepp: Now, I object to the question. There is no showing that this man filed that application. He stated that he didn't have anything to do with these forms and there is no reason to know that this witness would know the answer and I think counsel is just trying to confuse him and ask unfair questions to exhibit a response that might prejudice this man in front of the jury. I think that matter has been gone into. It is actually beyond the issues here.

The Court: I think the witness should be allowed to explain, if he can. I think the inquiry is proper. I will overrule the objection. At this time we will take a, I don't like to interrupt the examination. It is nearly ten minutes past eleven and members of the jury, I ask that you heed the admonition I have previously given to you. We will take a ten minute recess. [113]

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 11:10 a.m., the Court took a recess until 11:20 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Do the parties wish to stipulate that the jurors in the box are the jurors duly impaneled and sworn to try this cause?

Mr. McNealy: Yes, your Honor.

Mr. McNabb: We certainly will.

The Court: Very well.

#### A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further cross examination.

Q. (By Mr. McNabb): Now, Mr. Waxberg, to pursue this proposition just a little bit further, you say that, of course, your memory was probably more accurate at the time that this second amended complaint was filed than it is now, is that not true, the second amended complaint having been subscribed by you on the 20th day of November, 1951? A. I suppose, yes.

Q. Now then, it says here in the second paragraph of your first cause of action on the 2nd day of February, 1950, you agreed to construct a building for one million six hundred ninety-four thousand dollars. That was practically on the day that the [114] application was submitted, just a day or two later and the application was for a million sev-

(Testimony of A. E. Waxberg.)

en hundred eighty-two thousand. Do you have now a recollection of how you arrived at the one million six hundred ninety-four thousand when the commitment which you signed and which bore your name was for ninety thousand dollars more?

Mr. Hepp: I object to it as repetitious. He has asked the witness that four times that I recall now, your Honor.

The Court: I overrule the objection but I believe counsel is it not true that the language is on or about.

Mr. McNabb: Indeed it is, sir.

The Court: I think you confined it to the exact date. You may rephrase your question and I will permit the witness to answer.

Q. (By Mr. McNabb): Well, how did you arrive on or about the 2nd day of February at the figure one million six hundred ninety-four thousand three hundred seventy-four dollars?

A. That I don't recall. Evidently I assumed that that was the cost of, or the FHA mortgage for the construction of the building.

Q. But there was no FHA mortgage at that time?

A. Well, we were working on those figures.

Q. But the application that you submitted practically simultaneously with your alleged agreement, that is on or about [115] the 31st of January was for about ninety thousand dollars more, eighty-eight thousand.

Mr. Hepp: Now, I object to the question. There

(Testimony of A. E. Waxberg.)

is no evidence before this Court that he, this witness submitted that application. I don't think that the question is a fair one and I think that counsel should withdraw from arms length.

The Court: That is correct. That assumes that this witness compiled the application. There is no evidence to that effect. I will sustain the objection.

Q. (By Mr. McNabb): Were you a party to the application for the loan?

A. My name was on the application, yes. As I told you before I had very little to do with the paper work on that. My name was on it and that was as far as I, Mr. Hill took care of that phase of it. I figure if he put his name on it my name is O.K. to put on, too.

Q. You didn't know about the application having been filed?

A. Oh, I knew the application was being filed, certainly.

Q. You said this morning that you had seen a copy of it?

A. Well, as I recall I did. I must have, yes.

Q. But you had not seen anything at that time with the figure even close to the one which you allege you agreed to construct the building for?

A. Well, that was a long drawn out period of juggling figures here and in Seattle and back and forth and it would be [116] impossible for me to remember how it come about that we arrived at that figure. I probably assumed that that was the



(Testimony of A. E. Waxberg.)

FHA commitment because I don't believe, I never did see the commitment. Never was able to get the figure of the commitment. However, my name was on it. That might sound kind of foolish but that is exactly what happened.

Q. You never did get the figure that the commitment was issued for?

A. I never even got a copy of it. I even wrote to Juneau to get a copy of the commitment or the price of the FHA commitment but it was withheld from me.

Q. Do you believe now that it is pure happenstance that you came within a hundred seventy-four dollars of stating in your second amended complaint the amount of money for which the commitment was issued?

Mr. Hepp: I object to that as calling for purely speculation, what he now believes, saying something was happenstance. He said he figured this thing out. His figures were quite accurate.

The Court: I don't wish to preclude the cross examination as to how the plaintiff arrived at that figure and I will overrule the objection.

Mr. Waxberg: Well, I can't say how I come to that figure. I had it pretty well in mind what the commitment was but I was never allowed to see what it was. After I left Juneau [117] I figured that I would get a copy of the commitment as I was one of the sponsors on the deal, but I was knocked out of the picture entirely and this figure of one million six hundred ninety-four thousand, whatever

(Testimony of A. E. Waxberg.)

it is, is possibly as close as I could recollect that the mortgage would be.

Q. You mean that the mortgage was for, after the commitment was issued?

A. For, yes, that's right.

Q. So you believe now that you arrived at your one million six hundred ninety-four thousand figure from the commitment?

Mr. Hepp: Now, I object to that. That is a misstatement. He says he arrived at that from the basis of calculations. It is a matter of coincidence. I think that counsel is being unfair with this witness.

The Court: He may answer, overruled.

Mr. Waxberg: Well, as I say, it is so long ago that I can't tell you.

Q. (By Mr. McNabb): But that, is that not a reasonable assumption, Al?

A. Well, I was certainly involved in it all the way through and to remember the exact figures and how I arrive at them now, I don't know. It would be impossible for me to.

Q. Let me ask you this, do you now believe that you arrived at your one million six hundred ninety-four thousand figure after the commitment of one million six hundred ninety-four thousand came out?

A. No. I knew that the mortgage was for a certain amount and that we had worked up to that figure.

Q. When did you know that?

A. Well, that I don't remember. All I remember

(Testimony of A. E. Waxberg.)

is that I was involved in the deal from start to finish until the commitment was issued and how these figures come up and when they come up I can't answer. It would be impossible for me to answer intelligently.

Q. Let me ask you this then, do you believe now that at about the time you went to Juneau with the application for insurance and, or for an FHA loan on or about the 2nd day of February you agreed to build a building for one million six hundred ninety-four thousand dollars?

A. I don't remember. I wouldn't know.

Q. You just don't know whether you did or not?

A. No, I don't.

Q. Do you believe now that you ever agreed to build the building for which the application was submitted for a million six hundred ninety-four thousand dollars?

A. No, I don't believe I agreed to build it for that, no. I agreed to build a building but not for that specified amount.

Q. How much did you agree to build it for?

A. There was no specified amount that I would build it for. When this commitment was made the drawings were not completed and it would be impossible to know exactly what the, what I could construct the building for. [119]

Q. You mean by that that you would have required the final specifications, final specifications and the final drawings before you could ever have agreed on a price?

A. That's right.

(Testimony of A. E. Waxberg.)

Q. That is pages and pages of mechanical and plumbing and structural and electrical, those various items?

A. You would have to.

Q. You would have to have detailed blueprints?

A. Have to.

Q. Detailed specifications before you could ever have agreed on a price?

A. But you must remember that I was working on that and to get the specifications of the building down to a price where I could build this building for less than the mortgage and that I would be able to get the reasonable profit and that is where I was spending my time.

Q. But now you say that you were kicked out of this thing. At the time that you were kicked out, had the final plans and the final specifications been drawn?

A. No.

Q. At that time about as far as had been advanced was these drawings and these preliminary specifications and the commitment had been issued?

A. That's right.

Q. That is just about all that had been accomplished up to [120] that stage of the proceedings?

A. Yes. Then when I come to Seattle, I don't remember what time it was, but I came to Seattle and went into Chiarelli and Kirk's office to start to discuss this thing. I hadn't talked to Mr. Hill yet and Mr. Chiarelli informed me he could not discuss this building or this project any further with me.

Q. Al, did you ever after the commitment was

(Testimony of A. E. Waxberg.)

issued and prior to the time or about the time that you were kicked out, did you ever discuss actual dollars that you would require to build the building?

A. No, we had never, we had never entered into that phase of it.

Q. No, I say though after the commitment was issued and before you were kicked out, did you ever talk dollars to Rudy?

A. No, other than what, I remember one discussion about that if, I was to kick back fifty thousand dollars to him.

Q. What is the, do you know whether the property, the land upon which this building was to be constructed was free and clear, was it in Rudy's name?

A. It was not all free and clear, no.

Q. You know that?

A. Well, I, I didn't see it in black and white, but I gathered that in the conversation, yes.

Q. You know that part of the ground, or did you ever know or believe that part of that ground was just under an option? [121]

A. Well, it was, I don't know about that. I do know that the ground was, with the application why it, I was led to believe as well as all others that the ground could be cleared for a building.

Q. Yeah, otherwise you certainly would have never made application, would you?

A. Well, no.

Q. Al, you worked with Chiarelli and Kirk and

(Testimony of A. E. Waxberg.)

were in Seattle on these various trips, the moneys that you expended and the time that you consumed, you were supposed to have been paid from that from your normal builder's profit, were you not?

A. Well, that is a different deal. I can bid on jobs and never get the money as far as that goes, and that is expense that I have to stand. It is part of my business.

Q. I say though, in this instance you were supposed to recover your costs for these trips to Seattle and the time that you spent with Chiarelli and Kirk and the like from the profit, from your builder's profit on this thing, were you not?

A. Well, yes, I expected to when the building was done why I would be.

Q. That is where you were to be repaid for any moneys that you expended?      A. That's right.

Q. Any time that you lost, normally you spend time and money preparing to build these things, for instance like the [122] Nenana School, don't you?

A. That's right.

Q. And it is a part of normal, natural business expense?      A. That's right.

Q. And you are paid for that in whatever profit you make on the job?      A. That's right.

Q. And that is what was anticipated in this case, you and Rudy are going in together, build this building, you were going to build the building and any expenditures the same as Rudy spent his time on the thing, to you by way of the profits in build-

(Testimony of A. E. Waxberg.)

ing the building, to him by ownership in the building?

A. Well, this is a little different situation. Had Rudy come with plans and specifications, this building as it is now, how much will you build this building for and I give him a figure then I am out, but I helped promote this deal.

Q. I know you did.

A. And it is all together different than normal contracting operations.

Q. But how were you to have been repaid if it wasn't from the building?

A. Well, that is how I was to be repaid, through the building.

Q. Through the contract, through the building, the construction of it? [123]

A. That's right.

Q. And you were supposed to get to build this building after the final specifications came out. That is why you are working down there with Chiarelli and Kirk so you could have the building designed at a lower figure so you could have some profit guaranteed? A. That's right.

Q. And at the time that you made your profit on the building you then would be repaid for all of the moneys that you had expended just the same as the labor that went into the building?

A. That's right.

Q. And there wasn't any agreement on Rudy's part to pay you for those expenses other than as it came back to you out of the building?

(Testimony of A. E. Waxberg.)

A. No, there was no agreement that I was going to be kicked out of there either after the commitment was made.

Q. But that is the way you were supposed to get this money back, wasn't it?

A. Well, yeah.

Q. From the building? A. That's right.

Q. How many discussions did you have, how many times did you see Mr. Hill after the commitment was issued, or did you see him at all?

A. I don't recall seeing him at all. [124]

Q. Well, now, Al, when was this discussion when he demanded the fifty thousand dollar kick-back?

A. Oh, yes, that's right, too. That was in New Washington Hotel, I remember that, but what date. That must have been after the commitment was issued.

Q. Did you see him any other time?

A. I don't remember. I remember trying to contact him.

Q. But you have no recollection now of having seen him?

A. Well, other than the one time.

Q. Who was present at that meeting?

A. Mr. and Mrs. Hill and Larry Orsini and myself.

Q. Why was Mr. Orsini there?

A. Well, he was staying in the same hotel and they had some business dealings with Mr. Orsini, too, in regard to this building.

Q. You didn't have any agreement or any busi-



(Testimony of A. E. Waxberg.)

ness dealings with Orsini in reference to the building?

A. Oh, yes, he helped fill out the papers he, I worked with him on the promotional deal, on the filling out these forms. He had a big part of it.

Q. Let me ask you, do you recall in the New Washington Hotel and at that meeting a discussion between you and Mr. Orsini and Mr. Hill concerning a management contract of the building for Mr. Orsini?

A. That, that was between Mr. Hill. I remember discussion, yes. [125]

Q. There was such a discussion?

A. That's right. Mr. Hill and Mr. Orsini in the beginning of this building why there was some kind of an agreement between them. I don't know just what it was. Evidently it stopped there at, that was the end of the agreement or whatever it was between those two.

Q. But there was a discussion of a management contract of the building for Orsini?

A. As I remember, yes.

Q. On that occasion?

A. Yes. As I recall, Mr. Orsini wanted to manage the building and had been led to believe that he could be manager of the building.

Q. And Mr. Hill refused to give him such a contract?

A. That's right. I was witness to that.

Q. And Mr. Orsini left the room? A. No.

Q. No?

(Testimony of A. E. Waxberg.)

A. I don't believe so. I believe Mr. and Mrs. Hill left the room.

Q. Do you recall any conversation concerning stock in the corporation that occurred at that discussion?      A. I don't remember that.

Q. What?      A. I don't remember that.

Q. Do you recall that Mr. Orsini and you discussed with Mr. and Mrs. Hill them selling or giving, or as a part of the contruction agreement to give you fifty-one percent of the stock in the corporation?

A. I don't know if it happened then, but it was that discussion had taken place and they, I don't know if it was going to be stock but it was money that I was to leave in there and they could repay me.

Q. No, no, I am talking about stock in the corporation, stock in the corporation as such?

A. I don't remember.

Q. You have no recollection of when you and Mr. Orsini and Mr. and Mrs. Hill were discussing this matter in the New Washington Hotel that there was a discussion concerning the issuance to you and or Mr. Orsini or the both of you of fifty-one percent of the corporate stock?

A. I don't recall.

Mr. Hepp: I object to the question. There is no evidence that that discussion even took place with that subject matter. Counsel here is testifying and asking this witness if he remembers whether or not. The impression he is putting in the minds of the

(Testimony of A. E. Waxberg.)

jury is that that actually did take place. There is no evidence here in this Court that it did take place. I don't think it is a fair question. In fact, it is not a question. It is a matter of testifying by counsel. The Court: I will permit it to stand.

Q. (By Mr. McNabb): Mr. Waxberg, do you have any recollection of a meeting with Mr. and Mrs. Hill in the, in Mr. Kellog's office?

A. Mr. Kellog?

Q. A lawyer in Seattle, just two or three days following the New Washington Hotel discussion?

A. Yeah, I believe I had a meeting around there. I don't remember what it was about but I— (Interrupted)

Clerk of Court: Defendant's Identification E.

(Yellow sheet of paper with certain writings thereon was marked Defendant's Identification E.)

Mr. Hepp: May we see the paper, counsel.

Q. (By Mr. McNabb): You do have a recollection of having talked with Mr. and Mrs. Hill in a lawyer's office?

A. Yes, but I don't remember when it was. I think it was, well, I don't remember when it was, but I remember.

Q. Do you remember Mr. Kellog?

A. I wouldn't even remember the name if you didn't recall it.

Q. But you do recall a discussion in a lawyer's office?

(Testimony of A. E. Waxberg.)

A. I believe it was, I have a faint recollection, yes.

Q. You recall that after the meeting in the New Washington Hotel that they called you and asked you to meet them in this [128] lawyer's office?

A. I don't remember that.

Q. This is Defendant's Identification E. Do you know what that is, Mr. Waxberg?

A. I couldn't say that I ever saw that piece of paper.

Q. Do you recognize the writing?

A. No, I don't.

Q. You recognize the figures on there. Are the figures on there yours?

A. It does look a little like my writing. The figures are somewhat similar. I couldn't swear that it was my writing.

Q. You think that it isn't your writing?

A. I couldn't say if it is or not.

Q. What did you discuss in Mr. Kellog's office?

A. I don't remember. I never even remembered discussing it in Mr. Kellog's office. Never even thought of it.

Q. From that day to this?

Mr. Hepp: May it please the Court, I can't hear counsel's questions very good. He is up visiting with the witness. I think he should talk so we can hear.

The Court: Yes, I think that counsel has a right to hear the questions. I would like you to speak up, Mr. McNabb, and I would like the witness to speak

(Testimony of A. E. Waxberg.)

up so members of the jury can hear everything that is said.

Mr. Waxberg: No, this is not my handwriting. The [129] figures might be my handwriting.

Q. (By Mr. McNabb): I am not interested in the handwriting as such. I am interested now only in the figures, are they yours?

A. Well, that I can't say. I don't know.

Q. You mean you don't know whether you wrote this thing or you don't know when you wrote it?

A. I don't know that I wrote it. I may have, but it don't seem to me that, I don't remember anything about this.

Q. Do you now know what the figures a hundred eleven thousand, eight hundred eighty is?

A. No, I don't recall.

Q. You don't have any idea? Do you now know what the figure one forty-four is?

Mr. Hepp: Just a moment, I object to further questions until this paper is identified, it is explained. I don't know this, do you know now.

Mr. McNabb: That is what I am trying to get the witness to do, Mr. Hepp.

Mr. Hepp: Let the Court rule on the objection.

The Court: I understand the document has been identified.

Mr. Hepp: It has been marked for identification.

The Court: The— (Interrupted)

Mr. Hepp: I have heard no identification where it came from or whom. [130]

(Testimony of A. E. Waxberg.)

The Court: The witness so far has failed to identify anything about it, but I believe that Mr. McNabb will have a right to pursue or ascertain what the witness does know about it so the objection is overruled.

Mr. Waxberg: Well, the figures here that you are asking me about someone else has written in here. I know that that isn't my handwriting.

Q. (By Mr. McNabb): I know that is isn't, too.

A. So my answer is, all I could do is read them off to you as you ask me. If this wasn't put in here I would not know those figures at all and I still don't know what the figures are.

The Court: Well, the witness has not identified anything as yet here, Mr. McNabb.

Mr. McNabb: I know that, Judge.

Q. (By Mr. McNabb): Do you know now what the figure eleven thousand eight hundred eighty dollars is?

A. No, I don't. I would never have recognized it and I still couldn't recognize it as the figure it says, you have written down here, you or someone has written in there.

Q. You don't know what it is?      A. No.

Mr. McNabb: Your Honor, may we have the noon recess now. [131]

The Court: Any objections? Members of the jury, once more I admonish you to heed the admonition I previously gave to you not to discuss this case with anyone or among yourselves, and not to express any opinion thereon until the case

is finally submitted to you. You will, please, return to your places at two o'clock.

Clerk of Court: Court will recess until two o'clock.

(Thereupon, at 12:00 noon, a recess was taken until 2:00 p.m.)

### Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

Clerk of Court: Court is reconvened.

Mr. Hepp: We will stipulate as to the jury.

The Court: Very well. The plaintiff has stipulated that the twelve members in the box are the jurors duly sworn and impaneled to try this case.

Mr. McNabb: As will the defendant.

The Court: Very well.

### A. E. WAXBERG

the witness on the stand at the time the recess was taken, resumed the stand for further cross-examination.

Q. (By Mr. McNabb): Mr. Waxberg, at the time that you made application or the application was made for a commitment under the Section 608, was there a, was there to your knowledge a requirement that the [132] builder or the contractor be bonded?

A. Well, yes, at the time whenever the, whenever the plans and specifications were out so that

(Testimony of A. E. Waxberg.)

you would know what to be bonded for. You couldn't pick a figure out of the skies and say you want bond for so much.

Q. Well, you knew that the building would run probably a minimum of a million and a half at any rate, didn't you?      A. Yes.

Q. Did you make any effort to determine whether or not you could secure such a bond?

A. Well, in a manner I did. I was approached by a man from the National, or Washington Mortgage Company that I should bond with them providing this job went through, providing we got the commitment as I recall it.

Q. Who did you talk to?

A. I believe I talked with Mr., well, he was here yesterday, what's his name?

Q. Sumter?      A. Sumter, yes.

Q. Did you talk to anybody else?

A. Well, I don't know who else was in his office.

Q. The bonding discussions that you had were limited?      A. They were limited.

Q. To those of Mr. Sumter?

A. I believe he, as I recall it he said that with my [133] statement he couldn't bond this particular job so on and so forth. I wasn't even asking. It was him that was asking me for a statement that he could handle the bonding. I believe I presented the statement to him. However, I wasn't bonding with those people at all. Never tried to get a bond.

Clerk of Court: Defendant's Identification F.



(Testimony of A. E. Waxberg.)

(Financial statement of A. E. Waxberg was marked Defendant's Identification F.)

Q. (By Mr. McNabb): You say the only discussion concerning your bonding capacity in reference to this job was with Mr. Sumter?

A. Yes, I never made any request for my, of the bonding company that I normally do business with because I didn't know how much I was going to have to bond for.

Q. Prior to this time had you secured any bonds, contractors' bonds?

A. For different, well, yes, I have been bonding with, for several years before that.

Q. Prior to, prior to January of 1950?

A. Yes.

Q. What was the largest bond that you had ever secured at that time?

A. I don't know. I believe it was around, between two and three hundred thousand.

Q. I hand you Defendant's Identification F and ask if you [134] know what that is, please?

A. This is a, it is a financial statement. However, this is a personal financial statement, not a company financial statement.

Q. That is your financial statement?

A. Yes, at that time.

Q. Do you know why this was prepared?

A. Well, it was requested by Mr. Sumter that I, as I recall it now, that I get a financial statement but as far as bond is concerned, why I was never required to get a bond.

(Testimony of A. E. Waxberg.)

Q. Did you discuss with Mr. Sumter your bonding capacity?      A. I believe I did, yes.

Q. What did he say to you in that regard?

A. Well, he said that I didn't have a statement that would warrant a bond of one million six hundred thousand.

Q. This was a, this constituted a true and correct statement at that time of your assets and liabilities?

A. That is what it was, yes. However, I was never requested to get a bond.

Q. Yes, I know.

A. And I could have gotten a bond.

Mr. McNabb: We have no further questions at this time.

#### Redirect Examination

Q. (By Mr. Hepp): Mr. Waxberg, were you able to locate any more checks or [135] other writings as evidence of your expenditures?

A. No, not other than what I have. Not other than what you have there.

Mr. Hepp: If you would be so good, Mr. Clerk, as to put these together I think it will save time and mark them all for identification, one identification.

Clerk of Court: Plaintiff's Identification 8.

(Certain statements were marked Plaintiff's Identification No. 8.)

Q. (By Mr. Hepp): Would you go through these parts of Plaintiff's Identification No. 8 and

(Testimony of A. E. Waxberg.)

I believe they are one, two, three, four, five, six, seven in all.

Mr. McNabb: May we see them, please.

Mr. Hepp: Excuse me.

Q. (By Mr. Hepp): Would you examine them, please?

A. Well, the first one is a check issued on March 6th to Pan-American Airways, Inc., one hundred ninety-four dollars, fifty-eight cents; and this is one January 1950 to Larry Orsini for three hundred dollars. Here is one March 1st to Larry Orsini for two hundred dollars; one here February 22nd to Pan American Airways, two hundred sixteen dollars, twenty cents.

Mr. McNabb: I am going to object to any testimony concerning the next check until such time as it is shown that it is relevant. [136]

The Court: The Court is unable to rule but does counsel wish to make an offer of proof or do you wish to pass it, or—(Interrupted)

Mr. Hepp: This next one that counsel refers to and I counted it, it would be five.

Q. (By Mr. Hepp): Just yes or no, Mr. Waxberg, does that portion of this Identification bear on any expenses that you have paid in connection with the subject matter before this Court?

A. Yes.

Mr. McNabb: Object to that, leading and suggestive.

Mr. Hepp: Just yes or no.

The Court: He may answer.

(Testimony of A. E. Waxberg.)

Mr. Waxberg: Yes.

Q. (By Mr. Hepp): Would you state very simply the term, what is it? A. It is a check.

Q. Just tell me what it is, is it a paper, a writing, a check, a document or what?

A. It is a check.

Q. And to whom is that check payable, what does it say on it? A. It is payable to cash.

Q. Just yes or no, did you cash that check?

A. Yes. [137]

Q. To whom or by whom was that check cashed, if you know?

A. Pan American Airways.

Q. How do you know that?

Mr. McNabb: Wait just a minute. It bears his endorsement.

Mr. Hepp: Well, I am getting right to that, Mr. McNabb, if you will allow me.

The Court: I believe the witness has a right to explain if you will proceed.

Mr. Waxberg: It is a check for cash for two hundred dollars which I took to the Pan American Airways to buy a ticket to Seattle.

Q. (By Mr. Hepp): Are there any endorsements on the reverse side of that?

A. It is endorsed by Pan American Airways, Inc., and endorsed by me as well.

Mr. McNabb: I withdraw objection to it, missed that.

Q. (By Mr. Hepp): Would you continue on, now. That covers No. 5, I believe.

(Testimony of A. E. Waxberg.)

A. O.K. Then here is a check dated February 28th, 1950, to Pan American Airlines for one hundred eight dollars, ten cents, and endorsed by Pan American Airlines and here is a receipt from Williams Equipment Company in the amount of four hundred seventy dollars.

Q. Now, would you, with the exception of No. 5 against [138] which there was an objection later withdrawn, but still with the exception of that, what were these expenditures for, if you know?

A. It was for travel pertaining to this particular.

Q. And the ones to L. Orsini, were they for travel?

A. No, they were for, paying him for things that he did for me pertaining to this.

Q. Looking down here, Plaintiff's Identification No. 6, which you have identified as being a bill from Larry Orsini in the amount of five hundred dollars, would you state whether or not there is any relation between the two checks here totalling five hundred dollars, and that bill?

A. Well, yes.

Q. What relationship is there?

A. Well, professional services from January 1st to March 31st, '50, preparation of financial statement for FHA commitment No. 130-42016.

Q. Those two checks then, that is for the amounts of three hundred dollars and two hundred dollars?

A. Three hundred and two hundred.

(Testimony of A. E. Waxberg.)

Q. Make up the five hundred which you paid to Larry Orsini? A. That's right.

Q. I see. Here is Plaintiff's Identification No. 7 which you have identified as a bill from Williams Equipment Company? A. That's right.

Q. And—(Interrupted) [139]

A. Dated June 7th, 1950, and it reads, City of Fairbanks charge of January 31st, 1950.

Mr. McNabb: Oh, the thing speaks for itself. If he wants to admit it let it be admitted. Move its admission.

The Court: He hasn't offered it as yet.

Mr. Hepp: I merely started to ask a question and the witness started to explain that. It wasn't in response to any offer.

Mr. Waxberg: Pardon me.

Q. (By Mr. Hepp): Now, Mr. Waxberg, you state this is a bill for four hundred seventy dollars?

A. That is correct.

Q. I note in the identifications that you have just identified there is a, a paid bill of four hundred seventy dollars to Mr. Williams of Williams Equipment? A. Yes.

Q. Is there any relationship to that payment and this bill? A. Why, yes.

Q. What is the relationship?

A. Well, it is paid in full.

Q. Now, going back to this fifth part which was that check in cash, I believe you stated in the amount of two hundred dollars which contained Pan American's endorsement on it?

(Testimony of A. E. Waxberg.)

A. Yes. [140]

Q. Would you state if you know what that check was for?

A. Well, it was plane fare one way to Seattle.

Q. Do you recall how much that one-way fare was?

A. I believe it is about a hundred eight dollars, somewhere in there one way.

Q. And Pan American cashed that check for you?      A. They did, yes.

Q. Did they return the balance, the difference between—(Interrupted)

A. Well, I got the balance, I wrote it out for two hundred because I probably was a little short of cash then, needed a little extra change.

Mr. Hepp: With the exception of Identification 3, which is the Baranoff Hotel bill which seems to be in dispute, I would like to offer into evidence Plaintiff's Identifications 1 through 8. That excepts in my offer No. 3.

Mr. McNabb: We have no objection to the Baranoff Hotel bill.

Mr. Hepp: I didn't offer it, your Honor.

The Court: He is not offering No. 3. Do you have any objection to the Identifications that counsel is now offering?

Mr. McNabb: Oh my, no.

Mr. Hepp: I don't know what the "oh my" is for, your Honor.

The Court: I want to explain to the members of the jury that this courtroom is so designed that

(Testimony of A. E. Waxberg.)

we cannot step out [141] from the bench and into Chambers conveniently for discussions that we wish to have in your absence and I don't like the whispering at the bench which has been taking place here previously and the only alternative I have, if I want to take up something with counsel in your absence is to discuss it, to excuse you for a few minutes and I ask that you heed the admonition that I previously gave you and will you, please, retire perhaps for five minutes. We will call you back.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

The Court: Now, gentlemen, for my own enlightenment, I realize there is no objection to the offer made, but for my own enlightenment I would like to know under what theory Identifications 1 to 8 inclusive, excluding No. 3, under what theory they are offered.

Mr. McNealy: Those, your Honor, are offered there in connection with the second cause of, what primarily I would say the third cause and the second cause of action to show the outlay of expenses in the work done for the benefit of the defendants here. More particularly I believe that on a numerical basis rather than any other.

Mr. McNabb: If it please the Court, if I may assist at this time if the Court would like to hear from me in this regard. Since I voiced no objec-



(Testimony of A. E. Waxberg.)

tions to the admission of those items I [142] will waive any argument at this time.

The Court: Yes. Well, there being no objection to the offer of the exhibits the Court will receive them at this time. The jury may be called back.

(Thereupon, the jury entered the courtroom and the following proceedings were had in the presence and hearing of the jury):

The Court: Parties stipulate that all members of the jury are present?

Mr. McNabb: The defense will so stipulate.

Mr. Hepp: We will stipulate.

The Court: The Court at this time will receive into evidence Plaintiff's Identifications No. 1 to 8, inclusive, excluding Identification No. 3. That was your offer, was it not, Mr. Hepp?

Clerk of Court: Identification 1 is Plaintiff's Exhibit A; No. 2 is B; No. 4 is C; No. 5 is D; No. 6 is E; No. 7 is F and No. 8 is G.

(Plaintiff's Identifications No. 1 and 2 were admitted in evidence as Plaintiff's Exhibits A and B; Plaintiff's Identifications 4 through 8, inclusive, were admitted in evidence as Plaintiff's Exhibits C, D, E, F, and G, respectively.)

The Court: And I wish to state that No. 3 was not admitted because it was not offered, at least among other reasons. [143] There was no offer made, Identification 3. You may proceed, gentlemen.

Q. (By Mr. Hepp): Mr. Waxberg, since you have been in business as a building contractor, have

(Testimony of A. E. Waxberg.)

you ever been prevented from performing a bid in contract by reason of the fact that you couldn't obtain the necessary bond?      A. No.

Mr. McNabb: I object to that as having no bearing on the issues of this case, improper redirect examination.

The Court: He may answer in view of the defense which has been interposed. It may stand.

Mr. McNabb: I would like to state this, anything that has occurred subsequent to the time herein in controversy is certainly not relevant to the issues here.

The Court: We could have the question read. I believe he was asked whether he was ever denied. What was your answer?

Mr. Waxberg: I said no.

The Court: Your answer was no?

Mr. Waxberg: No.

Mr. Hepp: We have no further questions.

Mr. McNabb: Nor have we.

(Witness excused.)

Mr. Hepp: We will rest the plaintiff's case.

Mr. McNabb: I would like to be heard, your Honor. [144]

The Court: In the absence of the jury?

Mr. McNabb: Yes, sir.

The Court: Members of the jury, once more I ask that you heed the admonition that I previously gave to you and perhaps it is going to be fifteen minutes before we will call you back. Fifteen minutes or longer.

Mr. McNabb: May we have a minute or two recess at this time.

The Court: Would you like one, too, Mr. Hepp? We will take a five minute recess.

Clerk of Court: Court is recessed for five minutes.

(Thereupon, at 2:30 p.m., the Court took a recess until 2:50 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: There is no juror serving on this case in the room at the present time. I believe we will have the doors closed, Mr. Bailiff, please. The only object in closing the door is to exclude the jurors who are serving on this case. Now, Mr. McNabb.

Mr. McNabb: Your Honor, we are perfectly willing to waive the reporting of this argument if the Court wishes, Court and counsel have no objection?

The Court: Well, I rather like to have the, all things stated in Court part of the record.

Mr. McNabb: May it please the Court, at this time we will, the defense moves for a directed verdict in favor of the [145] defendant first as to the entirety of the action as set out in plaintiff's complaint, that is directed toward the first, second and third cause of action and alternatively toward the first, second and third causes of action separately.

A recovery as we see it based upon the first cause of action is predicated entirely upon an express oral agreement. It is our position that the evidence is entirely contradictory in that regard, that there was and there has been introduced here no proof

whatever of an express agreement or an express contract between Mr. Hill and Mrs. Hill and Mr. Waxberg for the construction of the building. It is our contention that the testimony of Mr. Waxberg is precisely contradictory to that.

The following questions and the following answers were put to Mr. Waxberg, the following questions to which he answered as follows: Question, Now then, what you mean is you would certainly have not agreed to construct a building for a specific price on no more plans than those. Answer, "No".

The Court: Plaintiff's counsel have a copy of the transcript from which you are reading? Do you wish one, gentlemen?

Mr. McNabb: The question, "You wouldn't ever have done that, would you?". The answer, "No, you have to have specifications. That is just some drawings. They are nothing on it outside of an outline of it". Question, "No contractor in the world would have agreed to such a thing, would he?". Answer, [146] "No, and we submitted more. FHA wouldn't even consider an application". Question, "How much did you agree to build it for?". Answer, "There was no specified amount that I would build it for. When this commitment was made the drawings were not completed and it would be impossible to know exactly what the, what I could construct the building for". Question, "You mean by that you would have required the final specifications, final specifications and the final drawings before you could ever have agreed on a price". Answer, "That's right". Question, "That is pages

and pages of mechanical and plumbing and structural and electrical, those various items?". Answer, "You would have to". Question, "You would have to have detailed blueprints". Answer, "Have to". Question, "Detailed specifications before you could ever have agreed on a price?". Answer, "But you must remember that I was working on that and to get the specifications of the building down to a price where I could build this building for less than the mortgage and that I would be able to get the reasonable profit and that is where I was spending my time." Question, "But now you say that you were kicked out of this thing. At the time that you were kicked out, had the final plans and the final specifications been drawn?". Answer, "No". Question, "At that time about as far as had been advanced was these drawings and these preliminary specifications and the commitment had been issued?" Answer, "That's right". Question, "That is just about all that had been accomplished up to that stage of the proceedings?" [147] Answer, "Yes. Then when I come to Seattle, I don't remember what time it was, but I came to Seattle and went into Chiarelli and Kirk's office to start to discuss this thing. I hadn't talked to Mr. Hill yet and Mr. Chiarelli informed me he could not discuss this building or this project any further with me."

Now, your Honor, the testimony of the plaintiff, he would not under any circumstances have agreed to construct this building by the time that he was disassociated or no longer associated with Mr. and Mrs. Hill. That is the testimony of the plaintiff,

that there never was an agreement at any time reached to construct any building, principally for the reason that there had been no plans and specifications which a contractor, any contractor could have used as a basis for determining a price. In this case, there were none, by the admission of Mr. Waxberg and his own statement that there was never an agreement as to price. Never was. That he, they at the time that the commitment was issued the only thing that they had according to Mr. Waxberg was just rough drawings.

Now, your Honor, by the same token, in the first cause of action the plaintiff seeks to recover as damages fifty thousand dollars. There has been no testimony concerning how that amount of money was to, or could be established. If there were a contract here, the recovery would be limited to the profit to Mr. Waxberg, that is the difference in the cost of constructing a building and the amount of money which had been agreed upon [148] to be paid. Primarily there is no testimony as to any amount of money having been agreed upon as a price and there is a total want of testimony or specific testimony touching on the point of how much it would have cost Mr. Waxberg to build the building. In response to a question by Mr. Hepp he said it would be impossible for me to know whether there is ten thousand or fifty thousand or a hundred thousand dollars of profit. The fact of the matter is that by his testimony it was impossible for Mr. Waxberg at any stage of these proceedings to have ever reached an estimate of what he would build the

building for. There was, he could not even have agreed or his testimony is that he would not have agreed under any circumstances upon a price to build the thing for until such time as there is testimony here introduced as to what he agreed to build it for and what it would have cost him to build it, recovery in this thing as a matter of damages is limited to that specific amount and there has been no testimony in that regard, so as to the first cause of action I submit to you that there is testimony that there was no contract.

And secondly, that there has been no proof of damages.

Now, as to the second and third causes of action, those, your Honor, are based upon the theory of quantum meruit and I believe if we interpret the legal theory of quantum meruit in a light most favorable to this plaintiff or to this, yes, to this plaintiff that we would consider the legal theory or the legal concept of quantum meruit as an implied contract under which a [149] person seeking recovery could or would expect payment for services or remuneration for money expended. I think that this, so far as this case is concerned, that is interpreting the theory of quantum meruit or implied contract in the light most favorable to the plaintiff, that is, that the conduct was such that he could have expected to be paid.

Now, in that regard the following questions were put to Mr. Waxberg under cross examination. Question, "In this instance you were supposed to recover your costs for these trips to Seattle and the time

that you spent with Chiarelli and Kirk and the like from the profit from your builder's profit on this thing, were you not?". Answer, "Well, yes. I expected to when the building was done why I would be." Question, "That is where you were to be repaid for any moneys that you expended?". Answer, "That's right". "Any time that you lost, normally you expended time and money preparing to build these things, for instance like the Nenana School, don't you?". Answer, "That's right". Question, "And it is a part of normal, natural business expense?". Answer, "That's right". Question, "And you were paid for that in whatever profit you make on the job?". Answer, "That's right". Question, "And that is what was anticipated in this case, you and Rudy were going in together, build this building, you were going to build the building and any expenditures and the same as Rudy spent his time on the thing to you by way of profits in the buildings of the building, to him by ownership in the building?". [150] Answer, "Well, this is a little different situation. Had Ruby come with plans and specifications this building as it is now, how much will you build this building for, and I gave him a figure then I am out, but I helped to promote this deal." Question, "I know you did, and it is all together different from normal contracting operations?". Answer, "Yes". Question, "But how were you to have been repaid if it wasn't from the building?" Answer, "Well, that is how I was to be repaid, through the building". Question, "Through the contract, through the building, the construction of it".



Answer, "That's right". Question, "And you were supposed to get to build this building after the final specifications came out, that is why you were working down there with Chiarelli and Kirk so that you could have the building designed at a lower figure so that you could have some profit guaranteed?" Answer, "That's right".

Question, "And at the time that you made your profit on the building you would then be repaid for all the moneys you expended just the same as labor that went into the building?". Answer, "Right". Question, "And there wasn't any agreement on Rudy's part to pay you for those expenses other than as it came back to you out of the building?". Answer, "No, there was no agreement that I was going to be kicked out of there either after the commitment was made." Question, "But that is the way you were supposed to get this money back, wasn't it?". Answer, "Well, yeah". Question, "From the building?". Answer, "That's right". [151]

Now, your Honor, that negatives entirely any inference or any presumption or any assumption whatever on the part of Mr. Waxberg that he expected or anticipated repayment of any of the moneys that he expended in relation to securing this job, in relation to helping put the thing through. He was down there anticipating and perhaps undoubtedly assisting in the preliminary work on a building thinking that with the inside track and hoping that he would be able to construct it and assisting in getting the building costs down to a

place where he could make a profit on it and if in fact the building had been constructed and if in the planning of the building he had been able to secure a commitment and had built the building at a substantial reduction then he would have received an excellent profit.

Obviously from the answers that he gave to these questions he did not anticipate being repaid. He didn't say that he had ever made any demand on Rudy Hill or Mrs. Hill to pay him anything in advance, didn't say that he had ever at any time made demand on them. Never had requested them to pay him any money in advances or otherwise. In fact his testimony is quite the contrary to that theory, that what he did here is precisely what he did in bidding on the Nenana School job, which he testified that he now has. Under this theory a man would or under the theory of the plaintiff as he wants to advance it here, any time that a contractor desired to build a building, went to a person who is considering constructing a building and made suggestions or talked to anybody [152] at all, or made any trips to the city he then would anticipate recovery from the man with whom he had talked or who anticipated constructing a building unless he got the building. And here he said he expected to be repaid for his services from the profit of the building, just the same as the labor on the building would be repaid. That doesn't sound in an implied contract or in quantum meruit. Quantum meruit requires that there must be in the mind of the person seeking to recover a reasonable grounds to an-

ticipate that the services that he has, or is then performing will be paid for.

Your Honor, I submit to you that everything that was done in this instance was preliminary to the creation of a contract, preliminary to an agreement to build a building. And the testimony is completely in accord with that theory. There never was a contract. The building was not constructed. There should be no recovery.

Mr. McNealy: If it please the Court, counsel with one breath seems to argue the point that there was no contract, no contract established but the, in the next breath argues the point that anything that the plaintiff here is to recovery why he was to recover out of the contract for building the building. It seems to me his statements are highly inconsistent. Either there is a fallacy in his, in counsel's statement there that he is to recover these expenditures from the contract to build the building or there was no, either was a contract or wasn't a contract and [153] counsel cannot argue the matter both ways in one breath, say there was, imply there was and another one that there wasn't.

If there was no contract then there was no possibility of, under counsel's theory, of him recovering anything from the builder's profit. He would have had to look elsewhere for his remuneration. Now, speaking frankly with the Court, I am far from well satisfied with the testimony in regard to the first cause of action. However, I am not throwing in the sponge so to speak on that first cause of action. At the moment I don't believe that any con-

tract, while there is an amount set in here and while the plaintiff was indefinite as to when this figure was arrived at, I think that a contract of this kind, in fact many contracts which no price at all is mentioned. I think it was established by the plaintiff here that there was an agreement between he and Hills to construct the building. I think he fell down on testimony as to what amounted to the construction. The contract whereby he would, the agreement there where he would furnish the materials and do a job, I don't think according to whatever plans and specifications they had would be sufficient, whether any price so long as he stayed within the price range of the FHA which seemed to be the nut and kernel of this whole action. This contract with no price involved, in fact common with regard to lumber companies and that where parties agree to take a certain amount of lumber and materials. And they take the lumber and materials, why they are liable to pay for them [154] regardless of whether there has been a price agreed upon or not and I think the same thing applies here. I think, trying to lead to, I think there was an agreement there, meeting of the minds at one time there early in this proceeding whereby Waxberg was to construct the building and the materials and other conditions were to go over until the plans and specifications came out, until they saw what they got out of the FHA. Waxberg was kicked out of the deal, using the language stated, prior to the time that these final plans and specifications came through. Now, he testified there that he was to, that the FHA would go along with

six percent for the contractor. Actually, he would get out of it whatever he could make in the way of profit, but he would have to invest and build this building within whatever they did get from the FHA.

I think there is, as the, the way the case stands now, I think it is even sufficient as in regards to the first cause of action to allow the matter to go to the jury, if there were no further testimony on either side for the jury to determine the facts. Naturally, I don't agree with learned counsel's theory on the matter of quantum meruit. I think that the Court knows, realizes that we have pleaded here within the Federal Rules on alternative cause of action here. I think if they are considering all the facts in the case, if there was no contract, or even if there is nothing more than a contract to make a contract and that by plaintiff's efforts and endeavors, by when we stand [155] uncontroverted at the present moment that he assisted Mr. Hill in the eventual realization of the Polaris Building.

Now, it is true the testimony here is that the Polaris Building is a different building than was constructed otherwise. If the Court please, the whole of this case ties in around the Federal Housing authority's program 608. As I remember from plaintiff's testimony he said that they had to meet a deadline on this 608 project. If that deadline hadn't been met then the present Polaris Building couldn't even have been built. He had done all of this preliminary work there up to and including the securing of this commitment under project 608,

which project, your Honor, so far as Alaska was concerned, went out of effect to the best of my recollection about the 25th of February, 1950. It would have been impossible or there were no further 608 commitments issued in the Territory except for revised commitments after that date. And certainly his services that he has performed with the contract for making a contract have been of value to the defendants here. If and in addition to the quantum meruit theory it certainly would be a matter of unjust enrichment if these defendants here can use the skill and the time and the expenditures of plaintiff if he accomplished nothing else than to secure for them the matter of the FHA commitment.

The fact was that he was an indispensable party in this action in dealing between Hill and between the architect, Chiarelli, and by reason of the termination date of this 608 where they had to have this in by the 24th, 25th of February. His services, I believe, were definitely indispensable and if for no other reason, your Honor, than that which I have stated, the plaintiff certainly as to his second and third cause of action is entitled to have the matter of the facts involved, to have it submitted to the jury for decision.

The Court: I might state at the offset that the Court feels inclined to direct a verdict for the defendants so far as the first cause of action is concerned and by way of comment I wish to state that Mr. Waxberg on the stand impressed me as being

honest and forthright when it came to important matters pertaining to this cause of action he couldn't remember because it was so long ago and I am commenting on that for a reason. Mr. Waxberg shouldn't suffer, no litigant should suffer because of congestion in Courts, but I am sure that his memory would have been better had this case been seasonably reached for trial. It is regrettable, having been filed in November 1951, that Mr. Waxberg comes to Court in August 1955 to seek his remedy. But, as you know, I can't guess and speculate and permit the jury to guess and speculate because of the lack of memory and the failure to know facts that are necessary to be known and shown to the Court and jury.

I have, of course, read and studied the complaint, second amended complaint and as I read it, it specifically sets forth that on a certain date the plaintiff and defendants entered into [157] an oral contract on the 16th day of January, 1950, whereby the plaintiff agreed to construct the building for the defendant and that on or about the 2nd day of February, 1950, plaintiff in accord with said oral contract agreed to construct said building for defendants at a total cost of one million six hundred ninety-four thousand, three hundred seventy-four dollars, which offer was accepted by the defendants. And plaintiff was instructed to proceed and so forth. Now, I can't find anything in the evidence that would bear out that type of a contract. The plaintiff has testified he doesn't know where the figure came from. There is no testimony that the defend-

ants did agree to pay him that particular amount to construct any kind of a building. He admits that he didn't know what the building would cost. He didn't see plans and specifications and I don't see how I could permit the jury to speculate on that. If the contract were proved by the plaintiff we, of course, would still have the problem of damages and there has been no testimony here, if there had been a contract for the specific amount, how much it would have cost to fulfill the contract. There is no way of measuring Mr. Waxberg's damages. As a matter of fact, he might not have been damaged at all. There may have been no profit in the construction of the building, had he received the contract.

I think that Mr. Waxberg was perhaps very improvident in his dealings. He dealt perhaps in good faith but not using very good business judgment. I don't know what he expected out [158] of this thing. It would seem that he was going to help the Hills procure an FHA loan and if they obtained the commitment then the Hills were to hire Mr. Waxberg to build a building of some sort and as he says, no agreement on the part of the Hills to reimburse him for money, time expended in procuring the loan. This cause of action is predicated on the express contract to build and when the evidence is in Court at most it seems is perhaps there was an agreement on the part of the defendant that maybe they, or that they would employ Mr. Waxberg to build some kind of a building for them if they got the commitment which is entirely differ-



ent than the complaint sets the cause of action forth.

Getting now to the second cause of action and the third cause of action, still the Court is troubled. According to the testimony of the plaintiff the most he expected as he said was that he would have recouped the amount of money that he expended from the profits of building the building and there is nothing before this Court, not a scintilla of evidence to show that there would have been any profit out of which he might have recouped. I don't think it would be proper for me to say, well, surely if he had a contract of over a million dollars he certainly would have made money; because the contract involves a lot of money doesn't necessarily involve a lot of profit. Do I have a right to speculate and say, well, if he had gotten this big contract there would have been a profit there whereby he could have recouped the amount he advanced? I don't know why he advanced the sums he [159] did. I can't figure it out from the evidence. I wish that I could figure out some way under the law whereby he might be reimbursed for the amounts that he advanced but if I had that power to order that amount paid, it might be an injustice because there is nothing in the evidence upon which I could base such an order.

So it is not a pleasant thing for me to do, but at this time I am going to grant the defendant's motion for a directed verdict so far as the first cause of action is concerned and if the plaintiff will elect as to whether they, whether he wishes to go along on the second or third cause of action I may

deny the alternate motion at this time. Does the plaintiff wish to elect as to whether he will proceed with the trial on the second or third cause of action?

Mr. Hepp: I don't quite understand the Court.

The Court: I will give you an opportunity to elect which cause of action, the second or third cause you wish to proceed under. If you wish a ten minute recess to discuss it, I will be pleased to grant it.

Mr. Hepp: Could counsel take a five minute recess?

Clerk of Court: Court is recessed for five minutes.

(Thereupon, at 3:20 p.m., the Court took a recess until 3:30 p.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court is reconvened.

(The following proceedings were had out of the presence and hearing of the jury):

Mr. McNealy: If it please the Court, the plaintiff at this time has elected to stand on the third cause of action of the complaint and elects that, your Honor.

The Court: And Mr. McNealy and Mr. Hepp, for the further enlightenment of the Court now, what is the exact theory of the third cause of action? In other words, are we relying on the existence of a contract and a breach thereof or is it some other theory?

Mr. Hepp: It is under an unjust enrichment theory, your Honor, for the reasonable value of these services as they may relate to the benefit

which the plaintiffs, which the defendants had. In other words, reasonable value of the services which I feel is sustainable under any theory even in an involuntary bailment when services are rendered for which there is a value to the recipient the Court will not stand by and allow it to go unrewarded. I don't understand Mr. McNabb's theory about what somebody expects or anything like that. In such instances where as in involuntary bailments where a person strenuously against his will is required to perform services in a bind, nobody has a thought of expectation. I am merely stating that it is no test at all. If these services of the plaintiff were valuable to the defendant and the law presumes nobody does anything for nothing or expects anything for nothing and a very strong showing is required to upset that presumption. We feel that under unjust enrichment and the reasonable value of the services as the inure to the benefit of the defendants is a valid cause of action and [161] there certainly is an ample showing at least to this point of those services being rendered and of the defendant receiving them which we feel obliges the defendant to pay for them.

The Court: It seems to the Court, Mr. Hepp, that there is certainly some testimony that the plaintiff performed certain services. Do you think you could point out where in the evidence shows that the services performed by the plaintiff were of value to the defendant?

Mr. Hepp: I certainly can, your Honor, if you take one instance of the, it is undisputed and un-

contradicted testimony, the drill soundings, the surveys and preliminary work are necessary for an FHA commitment. There is other uncontradicted testimony that the FHA commitment under this public law closed the latter part of February and this just slid in under the deadline, is no longer available and those things were indispensable parts of the defendant building any building at all.

The Court: And do you think, Mr. Hepp, that you can and will get some authorities for the Court and perhaps some requested instructions so that I may properly instruct the jury on the theory of unjust enrichment and reasonable value of services, provided, of course, the case does go to the jury. I don't mean to produce them at this moment, but you can submit to the Court requested instructions if any you have and any legal authorities that you may have on the theory of unjust enrichment and reasonable value of services as would be applicable to this case at bar. [162]

Mr. Hepp: I would be willing to do that provided, this has been the defendant's motion. I think that he should provide authorities to support his motion. He is the one that is moving the Court. I will be glad to respond to any authorities.

The Court: That is true. I anticipate a motion later on in the case also which may not take place.

Mr. Hepp: I would be glad to take up, to take the matter up then, your Honor.

The Court: Well, the Court would like to be fortified with authorities. Mr. McNabb, do you have anything further to add at this time?

Mr. McNabb: Your Honor, I wish at this time to renew our motion now specifically as to the third cause of action which the plaintiff has elected to proceed on and I wish once more to call to the attention of the Court the testimony of the plaintiff in, as regards where he anticipated and where he expected to receive his compensation and if there was no intention, your Honor, in the mind of this, of the plaintiff and the law is quite clear on that score. There is no doubt about the law in that regard, if these things were preliminary to a contract and these were negotiations in the expectation of receiving a contract to construct a building, and if the plaintiff did not anticipate payment and did not expect payment and made no demand for payment and didn't anticipate payment for the things that he did or the money that he expended except from the construction contract, it is and the Court may recall that I asked him on that score, did they discuss what would happen in the event that the commitment was not issued, and he said it was never even considered but his testimony is, but that is the way you were supposed to get your money back, wasn't it; and the answer, "Well, yeah, from the building, that's right."

The Court: But in this situation there was no agreement as to how he would be reimbursed if the commitment were not granted but the commitment was granted in this case and as I understand the plaintiff's theory and from the evidence that he claims there was an agreement that the Hills would have him build and if he built he would have re-

couped the expenses. That is the theory of the plaintiff.

Mr. McNabb: That's right, your Honor. I am in complete accord with that proposition. Certainly but there was no contract and the Court has already held that if that was a contract that is the thing that he should recover under, isn't it? A contract to build. That is why the, that is where the recovery comes. That is the allegation that he was supposed to build a building but there wasn't any contract and the Court has ruled in dismissing its first cause of action that there wasn't any contract.

The Court: The Court goes a step farther. I claim that it is highly speculative. We can't assume that if he had, had the contract been given to the plaintiff we can't assume that he would have made money. I don't believe that is a proper assumption. And there is no proof here that he would have made money [164] even though he had gotten the contract and that is what is troubling the Court on any theory.

Mr. McNabb: That is entirely correct, Judge, and there is the place that he has to recover if he, if recovery there is on a contract. It is all a basis. It does not—let me ask the Court a question. There has to be a meeting of the minds along the lines some place or there isn't any contract at all. Everything in the world was preliminary to a contract to build. Everything that was done was preliminary to a contract to build. The Court has now ruled that there never was a contract to construct a building, that it was pure speculation. Yet the plaintiff by

his own testimony has said every nickle that I put into this thing I put in anticipating to get my money back from the construction. In other words, in anticipation of the execution of a contract. He didn't anticipate, he didn't expect, he didn't intend to be paid for these things, Judge, except as a part of the contract to build and he could have lost a hundred thousand dollars or he could have made two hundred thousand. The whole works is based on that theory and now they want to come in here and say oh, no, that is not the way it was at all.

What quantum meruit amounts to is an alternative sort of a proposition, but they come in and allege a contract and Mr. Waxberg insists that the only place that he expected to recover any money at all was not from Rudy Hill but right out of the proceeds of that building contract. He didn't anticipate it. [165] He didn't expect it. Evidently he didn't want it because he didn't make any demand. He went ahead voluntarily. If you will recall his testimony in reference to Mr. Orsini he said for work that he did for me.

The Court: The Court at this time will deny defendants' motion as to the third cause of action of plaintiff's amended complaint.

Mr. McNabb: Well, your Honor, there is more now. I haven't finished.

The Court: And the Court will be pleased to have any authorities that counsel may wish to produce.

Mr. McNabb: I would like to point out to the Court in repleading paragraph two of their first, of

their second cause of action. Now then in the third cause of action they replead paragraph one of the first cause of action. In paragraph two of the third cause of action they replead paragraph two of the second cause of action which alleges that on the 16th day of January the plaintiff and defendant entered an oral agreement with plaintiff whereby plaintiff was engaged to build and construct a building to be known as Second and Lacey for an agreed sum of a million six hundred ninety-four thousand three hundred seventy-four dollars, and the Court has already ruled that that is not true.

Also, a little farther, that they spent fourteen days at work on the thing. There is no proof to that, on that score. [166] Total want of evidence in that regard. The testimony as regards L. Orsini is that he did work for me. There is no testimony whatever that Mr. McNealy was employed for Mr. Hill, no testimony that he was ever in fact employed. Actually in paragraph two, which they replead, it is based entirely on an agreement to construct a building. I am sorry if I take the Court's time but there are some of these things I feel the Court should consider at this time upon which there has been no proof.

There is no, I don't know what these exhibits show as far as taxicabs and telephone charges. I don't know what the proof is as regards meals. I don't think there is any proof in reference to a hundred twenty-eight dollars for meals.

The Court: Mr. McNabb, the fact that each and



every alleged element has not been proven would be no reason to grant your motion.

Mr. McNabb: Oh, that is entirely correct, but those things should never be allowed to go to a jury, your Honor, and this is, at this time they should be stricken for want of proof.

The Court: Well, of course, the Court will only submit to the jury, if the case is submitted to the jury, the items that are proved.

Mr. McNabb: Yes, but I want to get this record in here now. I don't want to slip any place along the line.

Mr. Hepp: May it please the Court, I don't understand what we are doing now. I understood the Court has ruled on all the motions before it. Is Mr. McNabb making another motion? [167]

The Court: It seems Mr. McNabb wishes to make further argument on his motion. Is that right, Mr. McNabb?

Mr. McNabb: That is correct, Judge.

The Court: Have you concluded?

Mr. McNabb: That is all I guess at the moment.

The Court: Gentlemen, it is nearly four o'clock.

The Court has a matter fixed for four o'clock, criminal matter. It will be a good opportunity, I will discharge the jury until ten o'clock tomorrow morning and so as not to have any uncertainty existing, the Court has denied the defendants' motion to dismiss plaintiff's third cause of action and while I am not going to ask the jury to return until ten o'clock tomorrow morning, I will continue this case until 9:30 at which time I will be pleased to have counsel

for the respective parties submit any authorities that you might have for the Court and it is possible that I may reconsider the motion to dismiss at that time. I would like the authorities you may have to present and I will see what I can find myself and will you, please, call the jury.

(Thereupon, the jury entered the courtroom and the following proceedings were had in the presence and hearing of the jury):

The Court: The parties wish to stipulate that the twelve persons in the jury box are the jurors duly impaneled and sworn to try this cause?

Mr. McNealy: Yes, your Honor. [168]

Mr. McNabb: Yes, your Honor.

The Court: Members of the jury, I ask that you heed the admonition I previously gave to you not to discuss this matter with anyone nor among yourselves; and not to express any opinion until the case is finally submitted to you, and you are excused until ten o'clock tomorrow morning. At this time the Court is going to take up some criminal matters.

And this case will be continued until 9:30 tomorrow morning.

(Thereupon, at 4:00 p.m., the trial of this cause was adjourned until 9:30 a.m., August 3, 1955.)

Be It Remembered, that the trial of this cause was resumed at 9:30 a.m., August 3, 1955, plaintiff and defendant both represented by counsel, the

Honorable Vernon D. Forbes, District Judge, presiding:

(The following proceedings were had out of the presence and hearing of the jury):

Clerk of Court: Court is now in session.

The Court: The Court at this time will take up any matters to be considered in civil cause 6481, Waxberg vs. Hill, et al.

Mr. McNabb: May it please the Court——

The Court: Mr. McNabb.

Mr. McNabb: The Court will recall that yesterday I [169] directed a motion to the Court for a directed verdict as regards the third cause of action stated in the plaintiff's complaint, which they elected to proceed on. The theory apparently of the third cause of action as it is stated is that the plaintiff is entitled to recover on the basis of quantum meruit. Quantum meruit, of course, is a legal doctrine which is based on an implied contract. The theory of quantum meruit being that a man who performs services for another expecting at the time that the services are performed that he will be paid for them and in the absence of a question, of a request that the services be performed that they are in fact performed under such circumstances as would lead the party for whom the services are being performed to believe that he would in fact pay for them. That is, there must, there is under that theory, under the doctrine of quantum meruit or under the implied contract there must be some showing that there was an intention to perform the services for money and a receipt of the services un-

der such circumstances and under such conditions as to negative the proposition that the services were being performed gratuitously. It is an equitable doctrine and quite a proper one. There is no question but that if a man sits idly by and allows services which are of value to him to be performed under such circumstances as there is reason to believe that the party performing the services will be paid then and in that event the law implies a contract. It requires payment.

Now, in this case I want to call particularly to the [170] attention of the Court the third cause of action is based upon an oral agreement. That in itself is sufficient to negative the quantum meruit theory because the oral agreement is an agreement to build a building. Now the Court, this Court, no Court in the world under the law can write a contract for people. There must be an absence of any contract at all and the Court implies a promise to pay for the receipt of services. The case *In Re McCarthy Portable Elevator Company*, 196 Federal at 247, the Court holds that the mere rendition of services does not necessarily carry the right to compensation where not performed on request of the person sought to be charged therewith, the circumstances of its rendition must be such that in law it will be presumed to have been rendered for the benefit of such person and not the party rendering it.

Now, the circumstances in this case are such that there was a contingent, a contingent recovery, a contingent profit of some considerable amount to

be had by this plaintiff in the event that this building were in fact constructed and the Court will recall his testimony which I have been over time and again. The single fact that one receives benefit from services, work or labor or incidental materials is not sufficient of itself to create a legal obligation to pay there for. That is the case of *Miller against Fisher*, 77 *Southeastern*, 151.

In 71 *Corpus Juris* at Page 54, which is under the title of work and labor, paragraph or Section 19, there is this [171] statement to be found. No recovery can be had for preliminary services performed with a view to obtaining business through a hoped for contract or order. Now, in that regard, your Honor, it is unfortunate that the cases which are cited in support of that proposition are very nearly unanimously reported in *New York Supplement*, which we have not, but if the Court will examine that citation, 71 *Corpus Juris* at Page 54, the Court will find there a substantial number of cases supporting that proposition. That is, that no recovery can be had for preliminary services performed with a view to obtaining business with a hoped for contract or order. We submit to the Court at this time that that is precisely what occurred in this instance.

Where services are as much for the interest of the party performing them as for the party for whom performed and the former has no expectation of charging there for at the time, a claim subsequently asserted for compensation therefor will be disallowed as a mere afterthought. That is *Equit-*

able Life Assurance Company of Iowa against Crosley, 265 Northwest at 137.

We submit again that that is precisely what was in mind here. There was no intention, no expectation at the time that the services which were rendered in this case were in fact rendered. There was no expectation at that time to charge for them. In fact the evidence is quite to the contrary. A promise to reimburse will not be implied for services performed for the mutual benefit of all of the parties concerned. Of course defined in [172] this instance that the defendants here are obligated to pay the plaintiff anything this Court must find that there was an implied contract, an implied promise to pay. That is contradictory entirely to the evidence and certainly, your Honor, the things that were done in this case, the services that were performed were done for the mutual benefit of the parties, that is Mr. Waxberg when he performed those services expected to realize a profit from the construction of a building. That is Williams against Adams, 195 New York Supplement at Page 86. Pardon me. Where services are voluntarily rendered by one person to another with no expectation at the time the services are rendered to charge therefor and the evidence is that there was no intention there is no showing or no proof in this cause so far that there was any expectation or intention to charge at the time that the services were rendered, such services cannot afterwards be used as a basis of an implied promise to pay. That is Serg against Walters, 122 Northeastern 2nd at Page 625.

For a party to recover the reasonable value of services rendered to and knowingly and voluntarily accepted by another the circumstances must be such that is to warrant the inference that the services were rendered and received with a mutual understanding that they were to be paid for since quantum meruit rests upon an implied contract. Mutual understanding. There was no such understanding, your Honor. *Twiford against Waterfield*, 83 South-eastern 2nd at 548. Where one person renders valuable [173] services to another which the latter accepts, the law will ordinarily imply a promise to pay the reasonable value thereof though evidence must disclose that the one who rendered the services did so under circumstances warranting a proper inference that he expected receipt of, that he expected the recipient of the services to pay for them. And that the recipient in accepting the benefit was or should have been aware that the services were being performed with that expectation.

Now, again, your Honor, I will call to the Court's attention that there was no expectation of being paid for them or to charge for them at the time that they were rendered and certainly there was no expectation of paying for the services. *Cole against Howard Corporation*, 219 Southeastern 2nd at 856. Where services are rendered under circumstances which do not support an inference of an expectation of payment the party for whom the requested services are performed or who accepts services is not under an implied obligation to pay there for. And certainly here the testimony does

not support any inference to pay. Cleaves against Sharp and Don, 171 Atlantic 374. Mere benefit from or the use of the plans of an architect did not warrant the recovery for services without proof that the defendant personally obligated himself to pay. That is Green against Message, 258 New York Supplement 28. No contract to pay for services rendered voluntarily without expectation of compensation is implied. Hammond against Consolidated Rendering Company, [174] 135 Atlantic 197. Am I taking all of the Court's time?

The Court: Perhaps, Mr. McNabb, you can sum up in a moment.

Mr. McNabb: Well, your Honor, I think probably the best case that I found and I have several others here, the case I believe which more closely approaches the fact situation in this case is Brightwell against Oglethorpe Telephone Company, 171 Southeastern at 162, which held that the plaintiff cannot recover for services rendered or money expended without request for the company which he thought he had bought under an oral contract since he actually or presumably knew that the agreement was unenforceable. Now, that is about as close as we can get to the case at bar. Mr. Waxberg's testimony is that there never was an agreement as to price, yet he did in fact spend money anticipating that he would recover that money plus profit from the construction of a building. There is no showing that there was a contract to employ Mr. Waxberg, and the Court further ruled in that case that generally services performed or money paid under a



mere mistake of law cannot be recovered. No liability arises from services rendered or acts done on request where the circumstances show that compensation was not intended. Carlson against Trench, 214 Northwestern, 928, and incidentally, there is a note on the subject at 54 ALR at page 550.

I wish only to state this to recover on their third cause of action this Court must hold, this Court must in fact create or form a contract for these parties based on an implied [175] agreement. Now, your Honor, we feel that that is not the situation here. There cannot be an implied agreement and we feel that this Court cannot hold that there was an implied agreement when the services were performed on the basis of a contract or negotiations for a contract which was not enforceable. To hold here that there is right to recover in quantum meruit would be to hold that there was in fact no negotiations for a contract and that in fact Mr. Waxberg did not perform the services or spend the money that he did in anticipation of a contract to construct a building and the proof is that he did in fact perform the services anticipating that the money would be recovered by him from the proceeds of that contract.

Mr. McNealy: If it please the Court, I think I can be very brief here. If the trial should continue I worked late last night on this case and some this morning here. First I, at this time can cite only two cases to the Court, 89 Pacific 86. The Court states in that in an action to recover the reasonable value of services performed that a contract claimed

to have been entered into between the parties was so indefinite that it could not be made the basis of recovery is immaterial. Where evidence as to the contract was introduced to show the nature of plaintiff's employment and together with proof of this breach was to be used as a basis for recovery for reasonable value.

51 Atlantic 652, contract for services failed by reason of the mutual misunderstanding as to the material, terms of [176] payment. A person who is, who has partially performed a contract as he understands it may recover reasonable compensation for his services. Counsel appears to forget and to believe that his clients here should profit by their wrong. That is in bringing out all the points here he failed to bring out that the defendant set in motion or actually performed the act which prevented the plaintiff from completing the contract or even entering into a contract and in that connection, your Honor, based upon Rule, Section B of Rule 15 of which I am not going to read to the Court. I know your Honor is familiar with the rule and in the annotations, of course, are cases set up where during trial or even after judgment an amended complaint may be filed, cases in the annotation 76 Federal Supplement 233, that amendment of the pleadings should be allowed *were* the factual situation has not changed though a different theory of recovery is presented. I have prepared, your Honor, and am going, under Rule 15, Section B, declare a third amended complaint which conforms strictly to the proof and the evidence as sub-

mitted here and I am going to ask leave of the Court at this time for permission to file this complaint, which does conform to the proof since there was no objection to the testimony of the plaintiff as he gave it here, that his testimony in any way controverted his original pleadings.

I believe that we should be allowed to file it, also realizing that the matter is within the discretion of the Court.

The Court: Will counsel please submit the original of [177] the third proposed amended complaint with a copy thereof on the counsel desk, defendant's counsel?

Mr. McNealy: Your Honor, I have two additions to add to this. I haven't had the opportunity this morning or the time to examine the Clerk's exhibits.

The Court: How long will it take you, Mr. McNealy?

Mr. McNealy: Not more than a minute or two.

The Court: Very well, you may do so. The Court at this time will give the defendant, the attorney for the defendant an opportunity to be heard on the plaintiff's motion for permission to file a third amended complaint, copy of which was handed to the defendant's attorney.

Mr. McNabb: May it please the Court, yesterday if I recall correctly the Court dismissed the plaintiff's first cause of action and required the plaintiff to elect between the second and third alternative causes of action. After the election to proceed on the third cause of action, the defense renewed its motion to, for a directed verdict and pointed out

at that time that a recovery under the third cause of action was contingent upon a recovery on the first cause of action because it alleged a contract.

Now, your Honor, I submit to you that at that time, as of now the plaintiff had rested its case, his case. At that time it was incumbent upon the plaintiff to have proven a prima facie case, or in the event of failure of the plaintiff to prove a [178] prima facie case we feel that the law is that the defendant is entitled to a directed verdict.

Now, it appears to the defense that this is a fourth cause of action. I submit to you that without objection and prior to the time that the plaintiff rested they could then have moved this Court for an order amending the pleadings to conform to the proof, but we feel now that their motion to amend or to submit a fourth cause of action is untimely and that no provision for it is allowed under the law. They chose to stand and this cause went to trial on the issues which were raised by the plaintiff's complaint. We have had no opportunity to cross examine on any of these things. I don't know what the status of the case would be in the event that the Court allows the filing of an amended complaint. I take it then that we would have to commence again, that the previous trial or the evidence and the proof that is in at this time would stand for naught yet the law requires and the rules require that the plaintiff must in his complaint set out every claim that he has against the defendant.

It would appear to me that to allow the filing of an amended complaint at this time or if that were

the law that there would never be any end to litigation, that by the same token if a man comes before the Court, thinks that he proves one case through evidence which is not based upon the complaint, and I submit to you, your Honor, that though we may have objected, could have perhaps objected to various testimony of the plaintiff [179] we did not do that for the reason that the proof and the testimony at that time we felt had no bearing on the issues, that they didn't tend to prove the allegations of any one of the three causes of action which were set up in plaintiff's complaint. Now apparently what they seek to do is to establish by previous testimony the relevancy of a brand new complaint now after having testified they want to come before this Court and file a new complaint, start all over again. This it seems to me is an admission on the part of the plaintiff that our motion to dismiss the third cause of action has merit. Where is litigation to end? We did not come here prepared to defend on an amended complaint and any testimony that no harm or no prejudice would result to the defendant in this case or either of them, if we allowed all sorts of testimony to go in which were not relevant or material to the issues which were involved in plaintiff's original complaint, or plaintiff's second amended complaint, the allowance of this complaint, Judge, is highly prejudicial because apparently they feel that this is what they have proved.

Now if they had moved prior to the time that we addressed our motion to the Court for a directed

verdict, if they had then moved or had submitted a written complaint amending the complaint to conform to the proof as they had put it on, there would have been we feel some authority under the law for the Court to have allowed it, but that must be timely done prior to the time that we moved to dismiss or for a directed verdict. [180]

Judge, a plaintiff we feel in any lawsuit must prevail or must fall on the issues as they are drawn prior to the trial. This plaintiff cannot prevail on his complaint, first, second or third cause. The actions which are started in a man's complaint are those things which a defendant comes before the Court ready to defend against. We feel that there is no place under the law, I sympathize with this plaintiff but moral issues are not involved. This is not an ecclesiastical court, a Court of equity, yes, but moral considerations are not involved here. We feel that the law does not allow this, that there is no provision under the law and each of us feels sympathetic on many occasions toward litigants and toward all nature of people in society, but as practicing attorneys if we were to judge matters according to our own moral concepts and did not rely on the law as we know it or believe it to be then many of us who practice law would be required if we were to judge the right or wrong of man or his conduct, we would be required to say to a large percentage of our clients, I am sorry, I cannot represent you because I think what you have done is wrong. But as in criminal matters, lawyers and Courts can only rule not according to their own conscience, not ac-

according to the Christian doctrines with which they have become inculcated or indoctrinated, but what is the law. We don't make it. We interpret it. And that is the way law suits are run.

We feel that there is no right under the law for the allowance of the filing of this amended complaint.

The Court: The Court believes it has the absolute right under this kind of a situation to do a number of things, among them to grant a dismissal of the third cause of action without prejudice which under these circumstances would seem ridiculous and result in additional time and expense for the litigants and the Court, and the evidence of the plaintiff has been taken before the jury without valid objections on the part of the defendant and I feel that justice requires that I at this time grant leave to the plaintiff to re-open its case for the purpose of amending the complaint to conform to the proof and that motion is granted.

I feel that the proposed third amended complaint is in conformance substantially with the proof of the plaintiff in this case and I cannot see that the defendants would be prejudiced by allowing that complaint to be filed and I so order.

Take a five minute recess.

Clerk of Court: Court is recessed for five minutes.

(Thereupon, at 10:20 a.m., the Court took a recess until 10:30 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Mr. McNabb, do you have an additional copy of the third amended complaint?

Mr. McNabb: I have only one copy.

The Court: You have a copy. Mr. McNealy, do you have an additional copy? [182]

Mr. McNealy: I do have. It is not, your Honor—I can spare this copy.

The Court: Will the bailiff, please, ask the jurors to come in.

Mr. McNabb: Your Honor, I requested that they not call them.

The Court: Very well, the Court will hear from you, Mr. McNabb.

Mr. McNabb: First, your Honor, I would like to request the Court to continue this matter now so that I may have an opportunity to study this complaint and to prepare an answer or otherwise plead in reference to it. This is a new one now, this is not the third cause of action. It raises issues which were not involved in any of the three causes of action which were stated in plaintiff's complaint. I made a rather hasty perusal of the, certainly have had no opportunity to study it or to give it any consideration and as the Court well knows, I have not been able to research the problem but my first thought is in reference to the, it seeks to recover under the prayer in quantum meruit for the breach of an oral contract again to build a building; that there was a contract to build; that it was breached and violated and by reason of the breach of an oral agreement to build a building. They now seek to recover in quantum meruit for the things that were done. Now that is a new problem and I have not had an opportunity to study that. [183]



It may be that this thing, even under the theory of quantum meruit should be dismissed. Until such time as I have had an opportunity to consider it and to research the problem—(Interrupted)

The Court: Have you concluded?

Mr. McNabb: No, sir.

The Court: Proceed.

Mr. McNabb: I think it would be prejudicial to the rights of the parties defendant in this action to proceed now without an opportunity to research the question involved in this case and having an opportunity to see what the law is on the subject.

The Court: Mr. McNealy.

Mr. McNealy: If the Court please, we feel there is substantial authority for this. There have been no actual new issues raised. The difference is out of the testimony here which went in on the part, major part not objected to. I don't believe that the rights of the defendants have been prejudiced. The fact situation here is the only thing which the original agreement failed to prove was that there was an express and binding contract as to how much he was to receive and it failed thereby. The plaintiff's complaint failed by a mutual misunderstanding and the, in that connection where there has been a mutual misunderstanding why the Courts are quite unanimous, even back under the old common law method of pleading. I have read cases back to 1901 which hold that in that event there is certainly right to recover for reasonable compensation and especially where the defendant has [184] done anything to prevent the performance of a

contract if one could have been performed. I think the testimony was, that was presented here as I say without objections by the defense. I don't believe that their rights have been prejudiced and I don't believe that anything can be gained by a further continuance. Actually there are no new issues involved and as the early, possible may be considered here a different theory of recovery and if so, the number of cases holding in that line that the defendants are not in any manner prejudiced. They have all of their rights of defense and the witnesses who either admit or deny in any manner controvert the testimony which has been given and I feel they should be in a position to go ahead.

In other words, your Honor, I can't see that the rights of any parties would be prejudiced by continuance.

The Court: I feel that the action taken by the Court in permitting the amendment of the complaint to conform to the proof does not in any way prejudice the rights of the defendant. I can see nothing to be gained by granting a continuance of the trial and so, therefore, will deny defendant's motion to continue. Will you, please, send for the jury.

(Thereupon, the jury entered the courtroom.)

The Court: Will the Clerk, please, call the roll of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.) [185]

Clerk of Court: They are all present, your Honor.

The Court: Very well. You may proceed.

Mr. McNabb: Your Honor, I am at a bit of a loss as to know; you want to proceed with the defense of this case or does the plaintiff intend to call additional witness or witnesses?

Mr. Hepp: We will re-rest the plaintiff's case.

The Court: Very well. Now, Mr. McNabb, you understand the situation so far as procedure is concerned. The *defendant* rested. That is what you wished to know, I believe.

Mr. McNabb: Your Honor, we will put Mr. Hill on the stand now requesting, however, that when Mr. Sumter arrives here—here he is now.

### GLENN ROY SUMTER

a witness called in behalf of the defendants, was duly sworn and testified as follows:

#### Direct Examination

Q. (By Mr. McNabb): Will you state your name, please?      A. Glenn Roy Sumter.

Q. Where do you reside, Mr. Sumter?

A. Seattle, Washington.

Q. By whom are you employed, sir?

A. Washington Mortgage Company.

Q. What are your duties?

A. I am president of Washington Mortgage Company. [186]

Q. Are you familiar now or were you familiar in the year 1950 with the Federal Housing Administration Act and the regulations concerning Section 608 of that act?      A. I am and I was.

(Testimony of Glenn Roy Sumter.)

Q. How did you become familiar with that act?

A. I spent ten years with the Federal Housing Administration. I was in the mortgage business before and after.

Q. When was that ten years that you were employed by the Federal Housing Administration?

A. Thirty-nine, '38 to '48.

Q. What were your duties?

A. Assistant Chief Underwriter.

Q. What did you do as Assistant Chief Underwriter?

A. I had charge of processing mortgage loans both multiple family and single.

Q. Did you have any experience or as a part of your official duties did you process loans for units of more than three apartments or more than four?

A. Yes, all multiple family.

Q. All multiple family. During that period do you have any recollection of the approximate number of projects, multiple unit projects that you processed or assisted in processing?

A. Oh, I would estimate a hundred, a hundred twenty-five projects.

Q. Were those projects in a particular area or were your duties confined, that is solely to a small area or to the entire [187] United States?

A. State of Washington.

Q. In the State of Washington. At what stage of the proceedings concerning a particular housing project did you first become acquainted with a particular project?

(Testimony of Glenn Roy Sumter.)

A. Would you restate that?

Q. Did you know or as a part of your official duties when did you first become acquainted or when did your first duties begin when an application was made for a loan?

A. Well, prior to the acceptance of the application.

Q. Prior to the acceptance. What was necessary to be done prior to the acceptance of an application so far as the FHA is concerned?

A. Well, you attempt to screen them so that you didn't go ahead or the sponsors didn't go ahead on a project that was not feasible, economically sound.

Q. Did you ever talk to any person or any group of people who were considering making an application and then after their discussion with you did not make an application?

A. Well, the procedure that was established at that time, we would always discuss a project before the acceptance of the application both with or as a rule with the architect and the builder and the sponsors.

Q. How then would you know, Mr. Sumter, that an application for a loan was proposed? [188]

A. Well, they would contact the office. I mean it wasn't a question of soliciting.

Q. Then it was customary was it, for you to discuss these matters even before you accepted an application? A. Always before.

Q. And after your termination or after you re-

(Testimony of Glenn Roy Sumter.)

signed from the service of the government under the FHA, what then did you do?

A. I set up the Washington Mortgage Company.

Q. And as such did you have anything to do or were your business relations continued in the matter of housing?

A. Yes, to quite an extent.

Q. What did you do in that regard, Mr. Sumter?

A. We acted as mortgage broker. Most of our business was originated through banks or lending institutions that had no particular staff for processing loans.

Q. What did that have to do with an FHA loan?

A. Well, there is considerable preparation or search prior to an application. A good deal of our work was involved in that phase of it.

Q. What has to be done or what normally did you do, let me ask you this, by whom were you employed in reference to FHA loans?

A. By the sponsors.

Q. And what did you do for them?

A. We would set up their application and handle the processing of the application through the lending institution and also through the FHA.

Q. Well, who is the lending institution or who may be the lending institution?

A. Any approved mortgagee, bank, insurance company.

Q. Mr. Sumter, who advances the money for the construction of an FHA project?

(Testimony of Glenn Roy Sumter.)

A. Well, it is entirely private financing.

Q. The government then does not finance these projects?

A. Oh, they have no interest so far as the FHA insurance is concerned.

Q. What does the government do in these matters?

A. They insure the lender against loss under certain conditions.

Q. Then a private institution may well put up the money. The government just insures the loan, is that correct?

A. Other than the Federal National Mortgage Association it is entirely private financing.

Q. Now then, after you established your own business how many FHA applications did you handle or have you handled?

A. I would say around a hundred projects.

Q. How many of those would you say are more than three unit, four unit projects?

A. Well, I refer to a project, it usually involves ten or more units.

Q. So then the hundred that you testified that you did in fact process all were more than ten units?      A. Yes. [190]

Q. Do you know R. P. Hill and Mary Hill?

A. Yes, I do.

Q. How long have you known them?

A. Since 1950.

Q. Where did you make their acquaintance?

A. They came to the office.

(Testimony of Glenn Roy Sumter.)

Q. Where is that office? A. Seattle.

Q. By that you mean your office?

A. Yes.

Q. For what purpose did they come there?

A. As I recall they were referred to our office from the National Bank of Commerce, Seattle.

Q. Did they make any inquiry of you?

A. At the time they first came to the office I was in the east and I believe it was about the third week of January, 1950, that I met them and at that time they were attempting to obtain a loan for the construction of an office building.

Q. Where was that building to be located?

A. Here in Fairbanks, Second and Lacey.

Q. Did you see any drawings or anything of the kind for such a building?

A. I don't recall seeing drawings. I believe there were some rough sketches or proposed.

Q. How large a building was that to be?

A. I don't recall the exact size, but it wasn't of any [191] great height.

Q. Would the, was that an apartment building or just a business building?

A. No, as I recall it was a commercial on the ground floor and offices a floor or two above.

Q. And for what purpose did they consult you?

A. At that time I believe they were interested in obtaining an RFC loan which we had had no experience with nor knew a great deal about.

Q. Do you know now about the approximate date of that first conversation?



(Testimony of Glenn Roy Sumter.)

A. Well, I, I am quite sure that it was after the 15th of January, perhaps the third week of January.

Q. Of what year? A. 1950.

Q. What did you tell them in regard to an RFC loan?

A. They had previously had discussions with my associates and they were then thinking of an apartment building rather than the original office building.

Q. Now, I know now but as regards this RFC loan for a business building, what did you tell them in that regard?

Mr. Hepp: I object to that. I think that he said they may have had a conversation with his associate. I don't think this witness is qualified under his testimony to state what was said in that regard unless they clear that point up. [192]

The Court: Well, he can state what he told them, not what his associates told him.

Mr. Sumter: I don't recall we had any discussions on the RFC loan.

Q. (By Mr. McNabb): You had a discussion then in reference to an FHA loan? A. Yes.

Q. When did that discussion take place?

A. I would say about, it was in the third week of January.

Q. And did they request you to perform any services for them in that regard?

A. As I recall they had already contacted an architectural firm and were obtaining preliminary

(Testimony of Glenn Roy Sumter.)

plans for an apartment building at the time I first talked with them.

Q. Did you ever see those plans?

A. Yes, I did.

Q. Would you recognize them if you saw them, Mr. Sumter?

A. The outline of the plan. Not the particular plan.

Q. This, Mr. Sumter, is the Defendant's Identification A. I ask you to examine that if you will, please, and tell us what it is if you know?

A. It appears to be the preliminary plans that we used for processing the loan application for Mr. Hill.

Q. Mr. Sumter, do you know what plans were submitted to the FHA authorities with the application? A. Well, this set right here. [193]

Q. Well, do you know?

A. Well, I know their basic requirements as to preliminary plans.

Q. Do you know whether the entirety of the plans, the preliminary plans that you have in your hand were submitted with the application?

A. It is quite evident that they weren't because I took the plans to Juneau.

Mr. Hepp: Now, I object to that answer and ask that it be stricken. What is evident and what he knows is two different things.

The Court: It will be stricken. Do you wish to have the question read.

(Thereupon, the reporter read the question.)

(Testimony of Glenn Roy Sumter.)

Mr. Sumter: They were not submitted with the application.

Q. (By Mr. McNabb): Do you know what plans were submitted with the application? Let me ask you this, do you know which of those drawings was not submitted with the application?

A. That is why I answered the question the way I did. Here is a sheet that bears a date of February the 14th, so it could hardly have been submitted with the plans I took to use.

Q. Are there any other pages there that were not submitted?

A. It appears that they are the basic requirements for preliminary submission. Other than the sheet. [194]

Q. There is one sheet there which is dated late in February in the middle of February that was not submitted? A. Of the original set.

Q. Mr. Sumter, what did you do for the purpose of securing an FHA loan?

A. I don't quite understand the question.

Q. Did you perform any services for the Hills?

A. We prepared the application, submitted it through the bank and handled the processing through the FHA.

Q. I will hand you Defendant's Identification B and ask you if you know what that is, please?

A. Yes, I know what it is.

Q. What is that?

A. It is the application for mortgage insurance which we prepared.

(Testimony of Glenn Roy Sumter.)

Q. What did you submit with the application?

A. In addition to the plans and specifications?

Q. Yes. A. The items listed here.

Q. Well, will you read those, please?

A. Legal description, letter re ownership, letter regarding zoning, photographs, city map, request for determination of prevailing wage, personal financial and credit statement.

Q. Now, who prepared those?

Juror: I can't hear the witness. Will he, please, speak up. [195]

The Court: You understand, Mr. Sumter, that the jurors cannot all hear you. Will you please speak up.

Mr. Sumter: Do you want this repeated.

Juror: I didn't get all that you were saying.

Mr. Sumter: Legal description, letter regarding ownership, letter regarding zoning, photographs, city map, request for determination of prevailing wage, personal financial and credit statement.

Q. (By Mr. McNabb): Now, Mr. Sumter, after Mr. and Mrs. Hill came to you with regard to the submission of an application, who did the work necessary to proceed with the preparation of an application?

A. We obtained the architectural exhibits from Chiarelli and Kirk. As I recall Mr. Hill supplied the photographs and the city maps and the zoning letters.

Q. Aside from the architect was there anything

(Testimony of Glenn Roy Sumter.)

to be done or which was done to your knowledge that you did not do?

A. Insofar is the processing of it?

Q. That's right.

A. I don't recall that even Mr. Hill had any connection with the actual processing of the loan. It is handled through the bank and through the FHA.

Q. Who did, who did the work, who did those things? A. Our office did those.

Q. Mr. Sumter, did you know Mr. Waxberg or do you now know Mr. Waxberg? [196]

A. Yes, I do.

Q. When did you make his acquaintance?

A. I don't recall the exact time but it was some time early part of 1950.

Q. Where did you make his acquaintance?

A. In our office in Seattle.

Q. Do you know why he came there?

A. He came with Mr. Hill and he was at that time I believe interested in the construction of the proposed building.

Q. At the time that you made application or prepared the application for mortgage insurance whose name appeared on the application as sponsors? A. Mr. Hill and Mr. Waxberg.

Q. Do you know why those persons were named as sponsors?

A. Mr. Hill was the owner of the land and the primary sponsor, or I would consider it. Mr. Waxberg was going to participate insofar as a percent-

(Testimony of Glenn Roy Sumter.)

age of his contractor's fee. An application you must show how the loan is to be closed. The mortgage does not represent the cost of the entire project and I believe we set it up showing that around forty-five thousand or so of the allowable contractor's fee would be waived as participating equity.

Q. Why was that done, Mr. Sumter?

A. Well, as I recall at that time Mr. Hill did not have the capital to finance the project in its entirety. [197]

Q. Is the participation by Mr. Waxberg in this proposed building evidenced by the application?

A. I believe it is.

Q. Now, under Schedule A there, would you explain that to the jury, please?

A. Schedule A you set forth the source of equity which is the difference between the mortgage and the total cost of the project.

Q. Let's go into that just a moment, Mr. Sumter. What, why is there a difference between the amount of the mortgage and the cost of the project?

A. The mortgage can only represent a certain percentage of the total cost as estimated by FHA.

Q. Who estimates the cost of the project?

A. In the application the estimate is made by the sponsors. The commitment is issued naturally on the basis of the FHA estimate.

Q. The FHA, how does it arrive at the amount of the commitment?

Mr. Hepp: Now, I object to that. There is no showing that this man, this witness was in the FHA

(Testimony of Glenn Roy Sumter.)

at that time and I believe the best evidence of how the FHA arrived at that figure would be the people that did arrive at that figure. I don't believe this man is basically qualified to answer that question although he may be generally versed in the way he ran the office at the time he was there. [198]

The Court: If he is asked the preliminary question, whether he knows and answers that in the affirmative I will permit counsel to inquire.

Q. (By Mr. McNabb): Do you know how FHA arrives at the amount of the commitment?

Mr. Hepp: I object to that unless he specifies what commitment he is talking about.

Mr. McNabb: Any commitment.

Mr. Hepp: I object, too general.

The Court: Yes, objection sustained.

Q. (By Mr. McNabb): Do you know how much the commitment was issued for in this case?

A. Well, I see a figure on the application one million, six hundred ninety-four thousand two hundred dollars which I presume is the amount of the original commitment.

Mr. Hepp: Just a moment.

Q. (By Mr. McNabb): Let me ask you this, did you see a copy of the commitment?

Mr. Hepp: I move to strike the answer as not being responsive. He said he presumes it.

The Court: It will be stricken.

Q. (By Mr. McNabb): You saw a copy of the commitment? [199]

A. Yes.

(Testimony of Glenn Roy Sumter.)

Q. Do you know how the FHA arrived at the amount for which the commitment was issued?

A. By a cost estimate.

Mr. Hepp: I didn't hear that answer, sir.

Mr. Sumter: A cost estimate prepared by them.

Q. (By Mr. McNabb): Mr. Sumter, is that figure, that is the commitment figure or do you know, let me ask you this, do you know what percentage of the cost of the project was represented by the figure of the commitment?

A. At that time a loan could not exceed ninety percent of their total estimate of the replacement cost so it would have been ninety percent or less.

Q. Or less? A. Yes.

Q. And the difference between the ninety percent and the cost of the construction is represented by what you referred to a few moments ago as the equity? A. Yes.

Q. Now then, is that, when must that equity be established?

A. At the time the loan is closed which is prior to the start of construction.

Q. Now, let me ask you, do you know why Mr. Waxberg is shown as participating to the extent of forty-five thousand dollars here in the application? [200]

A. Yes. As I previously stated at that time Mr. Hill did not have the resources to, other than land, to construct it, or finance the equity requirements and forty-five thousand of the contractor's allowable fee was to be used as equity capital.



(Testimony of Glenn Roy Sumter.)

Q. And do you know why Mr. Waxberg's name was placed on the application?

A. As I recall at that time he was interested in building the proposed building for them.

Q. In the applications that you processed while an employee of the government and the FHA and prior to this time in your own business, did you ever know of an occasion in which a builder was also a co-sponsor?

Mr. Hepp: I object to the question as too general, not within the issues of this cause, and for that reason prejudicial.

The Court: Sustained and while, Mr. McNabb, the Court is always very reluctant to interpose or ask questions I am going to ask Mr. Sumter a question at this time. Do you, Mr. Sumter, know the definition of the word sponsor as used under Title 608 of the Federal Housing Authority?

Mr. Sumter: Yes, sir.

The Court: What is that definition?

Mr. Sumter: Under the original act or rather under the original rules and regulations they require a corporate mortgagor rather than an individual. The corporation is never formed prior to an application so they developed the word sponsor as meaning [201] a person proposing a loan application which later will become a corporate entity.

The Court: Thank you. You may proceed.

Q. (By Mr. McNabb): Was it usual for a builder to be a sponsor as well?

(Testimony of Glenn Roy Sumter.)

A. My experience, ninety-five percent of our applications are builders.

Q. Is it customary for there to be more than one sponsor on an application representing divergent, perhaps divergent interest?

A. Yes, it is quite customary.

Q. How much interest does the application state that Mr. Waxberg would have or to what extent was he to participate in this building as a sponsor?

A. Dollar-wise?

Q. Yes.

A. It shows forty-five thousand.

Q. Now, Mr. Sumter, are there other costs involved in the construction of a building or the closing of an FHA other than the land itself?

A. There are many costs other than the land itself.

Q. And what are they?

A. Your primary cost, of course, the building. Then you have your architect's fee.

Q. How much, does the FHA allow a specific amount to go [202] toward the architect or to the payment of architects?      A. Yes.

Q. And how is that amount determined dollar-wise, percentage-wise?

A. Percentage-wise.

Q. Percentage of what, sir?

A. Percentage of their estimate of construction costs of the building.

Q. And what percent is that?

A. It will vary in localities from three to six.

(Testimony of Glenn Roy Sumter.)

Q. Do you know what they allowed in this case?

A. Five.

Q. Five percent of what amount?

A. Five percent of their estimate of construction costs which I don't remember the exact dollars.

Q. Mr. Sumter is the amount that the commitment is issued for, is that to be the construction cost?

A. No, it is ninety percent or less of their estimate of the total cost.

Q. But it is not based at all on construction costs?

A. Construction cost is only one part of their total estimate.

Q. How much was the architect's allowable fee in this case, if you know?

A. I don't recall. [203]

Q. At any rate, you know it would be five percent or you know they allowed five percent?

A. Yes.

Q. Of the construction cost, is that correct?

A. That's right.

Q. Do you know what the allowable construction cost was in this instance?

A. I don't remember.

Q. Would that figure appear on the commitment as it was issued?

A. No, it would appear on the project analysis which is issued in connection with the commitment.

Q. Do you have a copy of the project analysis?

A. I do not have it with me.

(Testimony of Glenn Roy Sumter.)

Q. You do not. Are there any other allowable fees and costs other than the architect's fee?

A. You have to keep in mind that this is a construction loan. In addition to the building you have an architect's fee; you have your interest during the course of construction; you have taxes during the course of construction; you have FHA fees which amount to one and three-tenths percent.

Q. Of what, sir.

A. Of the amount of the mortgage. You have your title and recording expense; you have your legal and organization expense; and you have your financing charge which is made by the lender, [204] all of which usually amount to seven or eight percent of the mortgage.

Q. And in this instance you mean by that in this case then seven or eight percent of the amount of the commitment, the commitment represents the amount of the mortgage, does it not?

A. Yes. Of course, the land is not included as a cost because it must be free and clear at the time of closing.

Q. How many times did you talk to Mr. Waxberg?

A. I don't recall talking to him more than two or three times at that date.

Q. How long did you work on this project, Mr. Sumter?

A. As I recall the application was started some time around the third week in January, 1950, and due to many conditions the loan was not closed until

(Testimony of Glenn Roy Sumter.)

I believe the summer of 1951 and the building was not completed until December or January of 1952, '3.

Q. Mr. Sumter, was the building as represented by these preliminary plans which were shown to you, was that building ever constructed?

A. No.

Q. Did you work on this particular project then from the second or third week of January until a building was completed? A. Yes.

Q. During the entire course of your interest in this project on how many occasions did you talk to Mr. Waxberg, if you know?

A. As I previously stated, I only recall talking to him two [205] or three times during the early part of 1950.

Q. And that is the only discussions that you ever had with him in connection with this project?

A. Yes.

Q. Do you know when the application for mortgage insurance was submitted? A. Yes.

Q. When was it submitted?

A. I would say the third, fourth or fifth of February, 1950.

Q. Where was the application filed?

A. In Juneau, Federal Housing Administration.

Q. By whom was it filed? A. I filed it.

Q. How did you do that?

A. We obtained the preliminary approval of the National Bank of Commerce around the first or second of February. They executed the application

(Testimony of Glenn Roy Sumter.)

which must come from a lender. We took the plans and other exhibits to Juneau.

Q. You took them to Juneau? A. Yes.

Q. Who accompanied you on that trip?

A. Mr. and Mrs. Hill, Mr. Waxberg and I believe Mr. Chiarelli.

Q. And that was early in February?

A. Yes.

Q. Do you recall having had any conversations with Mr. Waxberg prior to the time that you went to Juneau? [206]

A. Yes, I believe I met him prior to that time.

Q. Did you ever see him after that, after your trip to Juneau?

A. Yes, I believe I did.

Q. Do you know so far as your interest in securing this loan was concerned, do you know whether Mr. Waxberg performed any services at all in that regard?

Mr. Hepp: I object to that question. It is very vague and I think that it should be answered yes or no and if it is in the affirmative how he would know. I think the source of his information, I think it is purely an opinion and I object to it in its present form.

The Court: Objection is overruled. He may answer.

(Thereupon the reporter read the question.)

Mr. Sumter: Insofar as obtaining the FHA commitment or preparing the application he performed no services.

(Testimony of Glenn Roy Sumter.)

Q. (By Mr. McNabb): Now, what do you mean by preparing the application?

A. This instrument together with certain exhibits that we obtained from the architects. I am referring only to what was delivered to our office.

Q. And not what was submitted with the application?

A. Yes, what was submitted to our office from the architectural firm which we in turn submitted to the FHA.

Q. Let me ask you this, do you know who was solely responsible for the preparation of the application for an FHA loan? [207]

Mr. Hepp: I object to the question as leading and suggestive. There is no evidence that there was anyone solely responsible and I think the question should be rephrased.

The Court: I don't see how the witness can answer the question, but I will permit him to try.

Q. (By Mr. McNabb): Who would, was there anyone charged with the duty of preparing the application for loan? A. Our office was.

Q. Is there any question in your mind about that? A. No, there is no question.

Q. Who did the work? A. Our office.

Q. Who prepared the application?

A. Our office.

Q. Who filed it? A. I filed it.

Q. Did you ever request any assistance from Mr. Waxberg? A. Not to my knowledge.

Q. Would you know about it if you had?

(Testimony of Glenn Roy Sumter.)

A. I believe I would.

Q. Did you ever request any assistance from Mr. Orsini?      A. No.

Q. Did either of those persons submit anything to you that you used in the application?

A. Not that I recall. [208]

Mr. McNabb: May we have a recess at this time, your Honor?

The Court: Yes, I think it is time for a recess. Members of the jury, please heed the admonition that I have previously given to you and we will recess for ten minutes.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 11:20 a.m., the Court took a recess until 11:40 a.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: The parties waive the polling of the jury?

Mr. Hepp: We will stipulate that the jurors are present that were in this panel.

Mr. McNabb: Yes, your Honor.

### GLENN ROY SUMTER

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

Q. (By Mr. McNabb): Mr. Sumter, you are, of course, familiar with what is required to be filed with that application for insurance, are you not?

A. Yes.



(Testimony of Glenn Roy Sumter.)

Q. What is required to be filed with the application concerning the land upon which the building is to be constructed?

A. You must file a statement of ownership showing where either the land is in the name of sponsor or is under option or it will be obtainable. [209]

Q. And anything else concerning the land?

A. No.

Q. How does the FHA if you know, determine where the building is to be located?

A. As an architectural exhibit you file a survey which must carry the contour line usually referred to as a topographical survey.

Q. Do they require anything other than a, other than such a survey?

A. Not in a typical case. If there is evidence of slide or land erosion they might require additional engineering data.

Q. Was any additional engineering data required in this case with the application?

A. Not at the time the application was submitted.

Q. And so far as this building, that is when I say this building I mean the building as represented by the preliminary plans, was any additional engineering data required by FHA?

A. Not that I recall.

Q. Was a, do you know whether a drill log was submitted with the plans or the ground was drilled?

A. Not that I recall.

(Testimony of Glenn Roy Sumter.)

Q. Does the application show that such a log was in fact submitted with the application?

A. The application does not show it.

Q. Is such a log required under the act? [210]

A. Not as far as their preliminary processing is concerned.

Q. Mr. Sumter, I will show you Defendant's Identification C and ask you if you know what that is, sir?

A. It is a copy of FHA's commitment for insurance covering the Lacey Street apartments.

Q. Do you know when that was issued?

A. The latter part of February, 1950. It carries a date of February 24, but I don't believe it was received by the bank until the latter part, very close to the first of March.

Q. When the commitment was issued where was it issued, where was it executed?

A. In Juneau.

Q. And where was it sent?

A. To the National Bank of Commerce in Seattle.

Q. Why was it sent to the National Bank of Commerce?

A. They were the mortgagee at that time.

Q. What was the amount of that commitment, Mr. Sumter?

A. One million six hundred ninety-four thousand and two hundred dollars.

Q. Was that amount of money available for the

(Testimony of Glenn Roy Sumter.)

construction of the building which is represented by these preliminary plans?

A. That is the total amount of mortgage proceeds available.

Q. I know, now you didn't answer my question. Was that amount of money available to build this building? A. No, it was not available.

Q. Do you know what amount of that, or what part of that [211] amount was not available?

Mr. Hepp: I object to that unless this witness, he said this was forwarded to the First National Bank of Commerce or some other organization, and what they would loan. I believe that the best evidence would show from that organization and not this broker. I don't believe he could answer that question unless he guesses or just heard from somebody.

The Court: I believe, Mr. Hepp, he is trying to determine from the witness if he knows how much of the commitment was available for building purposes. He may answer if he knows.

Mr. Sumter: Not without the project analysis which was issued in connection with this.

Q. (By Mr. McNabb): Did you ever see a copy of the project analysis?

A. Yes, I have a copy of the project analysis.

The Court: If any members of the jury at any time can not hear it is important that you let the Court know because we want you to hear everything that is said and will Mrs. Templeton please

(Testimony of Glenn Roy Sumter.)

read back the last question and answer and we will proceed.

(Thereupon, the reporter read the question and answer.)

The Court: Is that satisfactory, members of the jury?

Q. (By Mr. McNabb): Do you know where that project analysis is?

A. In my files. They were at the—(Interrupted)

Q. Are these your files, Mr. Sumter? Not in this?

A. Those are my files but they don't pertain to this project. [212]

Q. You can produce that?

A. Yes, I can.

Q. It is in Fairbanks? A. Yes.

Q. Mr. Sumter, between the date of the application for insurance and the commitment or the issuance of the commitment is there anything at that time to be done by the sponsors or by anyone interested in securing the commitment?

A. As a rule there is nothing to be done. Occasionally they call for additional architectural exhibits.

Q. Was that done in this instance or do you know whether there was a request for any additional information in this instance? A. I do not.

Q. You do not know whether such a thing was done? A. No.

Q. Prior to the issuance of a commitment would a sponsor or does the sponsor normally investigate

(Testimony of Glenn Roy Sumter.)

concerning the cost of a building, the insurance for which is requested?

Mr. Hepp: Now just a moment, sir. I am going to object to that. If counsel wants to ask him whether it was done in this instance, I don't know whether what was normally done is pertinent to the issues before this Court.

The Court: Objection sustained.

Q. (By Mr. McNabb): Is there any assurance that a commitment will be issued [213] on the basis of an application?

Mr. Hepp: Now, I object to that. I think that is a matter for the offices of the FHA to give assurances rather than a broker. I object to this as this witness is not qualified to answer that question.

The Court: I will permit him to answer if he knows.

Mr. Sumter: There is no assurance when you make an application that a commitment will be issued.

Q. (By Mr. McNabb): Would any useful purpose be accomplished by an effort to ascertain the cost of the construction of this building by Mr. Hill prior to the issuance of the commitment?

A. I would say yes to satisfy yourself that the project is feasible if the amount you have applied for is granted.

Q. In this case was the amount which was applied for granted?      A. No.

Q. Do you know whether Mr. Hill sought to establish by investigation the cost of the proposed

(Testimony of Glenn Roy Sumter.)

building prior to the issuance of the commitment?

Mr. Hepp: Now, I object to that as calling for hearsay. What Mr. Hill did is not a matter which this witness could answer to.

Mr. Sumter: I do not know.

The Court: He has answered he did not know.

Mr. Sumter: I do not know.

Mr. Hepp: I didn't understand the answer then. I see. I will not move to strike then.

The Court: It may stand.

Q. (By Mr. McNabb): Did you recommend to Mr. Hill that he ascertain the estimated cost of the construction of the building prior to the issuance of the commitment?

A. I do not recall doing so.

Q. Did you normally do that?

Mr. Hepp: Now, I object to that, what was done in normal instances.

The Court: Sustained.

Q. (By Mr. McNabb): Would you have, would that have been a part of your normal duties as an employee and the person engineering the issuance of such a commitment?

Mr. Hepp: Now, just a moment, sir. I object to the question as speculative. He can state whether or not he did that in this instance. What he would have done as a matter of normalcy is not pertinent to the issues before this Court.

The Court: Sustained.

Q. (By Mr. McNabb): Do you recommend to other sponsors that they ascertain prior to the time

(Testimony of Glenn Roy Sumter.)

the commitment that they determine the cost or [215] estimated cost of the building?

Mr. Hepp: I object to the offer in evidence, merely repetitious as previously questions that have been asked, not pertinent to the issues here.

The Court: Objection sustained.

Q. (By Mr. McNabb): In determining the amount of money for which a loan, for which insurance is granted or permitted, do you know how the FHA people arrive at the figure at which is indicated on the commitment?

Mr. Hepp: Just a moment, sir. I object to that as not calling for a proper offer from this witness, how the FHA does something, and I don't think it is pertinent to the issues before this Court. He can ask him whether it was done in this instance. I think that covers the field.

The Court: If he knows he may answer the question.

Mr. Sumter: Quantity estimate is made by their architectural department.

Q. (By Mr. McNabb): By whose architectural department?

A. FHA's architectural department, sent to their evaluation department and then to the mortgage credit department to determine the value of the land, the capitalization of the rentals and so forth and mortgage credit to determine the financial soundness of the project. [216]

Q. Do you know whether or not there was at the

(Testimony of Glenn Roy Sumter.)

time that this commitment was issued a maximum amount established by the FHA per unit?

A. Yes.

Q. Do you know that amount?

A. Ten thousand eight hundred plus ten percent of that amount for other income producing space which is usually of a commercial nature.

Q. Was there such other space proposed in this building? A. Yes, there was.

Q. So it would be ten thousand eight hundred dollars plus ten percent? A. Yes.

Q. That amount to eleven thousand eight hundred eighty dollars? A. Yes.

Q. You know how many units were planned for the, or anticipated in this building now under discussion?

A. As I recall there were a hundred forty some.

Q. Did Mr. Waxberg ever discuss with you his bonding capacity as a, as the contractor on this proposed building?

A. I do not recall having any discussions with Mr. Waxberg concerning it.

Q. Did you discuss his bonding capacity with anyone?

Mr. Hepp: I object to that. I don't think that is [217] pertinent here. Certainly no foundation for any kind of conversation that would bind either of the parties here.

The Court: Counsel hasn't gone far enough yet to permit me to know who was present and so forth. He may answer.



(Testimony of Glenn Roy Sumter.)

Mr. Hepp: Just yes or no then.

Mr. Sumter: That wasn't the question.

Q. (By Mr. McNabb): Did you discuss Mr. Waxberg's bonding capacity with Mr. Hill?

A. Yes.

Q. Do you know where that conversation took place?

A. In Seattle.

Q. Did you ever see a copy of a financial statement of Mr. Waxberg?

A. Yes.

Q. I will show you Defendant's Identification F and ask you if you know what that is, please. Would you like me to take these?

A. This is a copy of the financial statement of Mr. Waxberg delivered to our office.

Q. Mr. Waxberg delivered that to your office?

A. Yes.

Q. How much of a bond was required, or let me ask you this, was there a contractor's bond required under the section of the act which was, under which the loan was proposed here? [218]

A. Yes.

Q. How much bond?

A. Not less than ten percent of the amount of the construction contract.

Q. How much of a bond or on the basis of that financial statement could Mr. Waxberg have received the required bond in this case?

Mr. Hepp: Now, I object to that. I don't believe this witness is able to answer that. What bonding companies will bond a contractor for is certainly not known by one man. Each company answers itself as to what it will bond and I object to the ques-

(Testimony of Glenn Roy Sumter.)

tion as highly unfair. He can state what he would bond Mr. Waxberg for.

The Court: Well, he is not in the bonding business as I understand it. I will sustain the objection.

Q. (By Mr. McNabb): Are you in the bonding business, Mr. Sumter? A. Yes.

Q. How many companies do you represent or do you approach as regards bonds of this type?

Mr. Hepp: Now, I object to the question. How many companies does he approach. I don't understand what that means. Either he is an agent for a company or not.

The Court: Yes, let's determine what he does in respect to bonds. [219]

Q. (By Mr. McNabb): What do you do in respect to bonds?

A. We submit them to insurance carriers.

Q. Normally, Mr. Sumter, does a company who writes bonds of the type here required grant to an agent the authority to bind it? A. No.

Q. Is a part of your business, that of securing bonds of this nature? A. Yes.

Q. How many different companies do you write bonds with?

Mr. Hepp: Now, I object to that question. I don't know what he means by writing bonds with. You mean sign the bond?

The Court: I don't understand it. I will sustain the objection.

Q. (By Mr. McNabb): With how many, with what number of bonding companies do you transact business?

(Testimony of Glenn Roy Sumter.)

Mr. Hepp: I object to that unless he defines what he calls transacting business. Buying a piece of stationery would be transacting business.

The Court: I think, Mr. McNabb, you should develop first the type of business that he does transact and then you can later go into the number. It isn't clear to the Court whether the witness on the stand is an agent of bonding companies, whether [220] he procures them for others and what he does do and I think the jury should know. You may proceed.

Q. (By Mr. McNabb): Do the companies which write bonds as the one of the type required under 608, do those companies grant to agents the authority to write bonds?

Mr. Hepp: I object to that. This witness can state if he has any authority from any company, but companies that write bonds and how they write them and who are their agents are certainly not relevant to the issues of this trial nor is it within the possible knowledge of this witness. He can state that he is an agent.

The Court: Objection sustained.

Q. (By Mr. McNabb): Are you the agent for any bonding company?      A. Yes.

Q. What company?

A. Eight different insurance companies.

Q. Will you name them, please?

A. Continental Casualty, USF & G, General, United Pacific, Hartford, Firemen's, Pacific Indemnity.

(Testimony of Glenn Roy Sumter.)

Q. Do those companies write bonds of the type required under 608? A. Yes.

Q. Do you know their requirements before writing the bond? [221]

Mr. Hepp: I object to that as too general a question.

The Court: I think further, Mr. McNabb, you might show how long he has been such an agent.

Mr. Hepp: I would like also to be shown just exactly what constitutes an agency.

The Court: Very well. Proceed. It is now twelve o'clock or a little bit past. Maybe it is a good time for the noon recess and members of the jury, I admonish you to heed the admonition I previously have given to you not to discuss the subject matter of this trial with anyone; nor among yourselves; and not to express any opinion until the case is finally submitted to you.

Clerk of Court: Court is recessed until two o'clock.

(Thereupon, at 12:04 p.m., a recess was taken until 2:00 p.m.)

#### Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Parties wish the jury polled?

Mr. McNealy: We will stipulate that they are all present, your Honor.

Mr. McNabb: We will so stipulate.

The Court: Very well. You may proceed.

GLENN ROY SUMTER

the witness on the stand at the time the recess was taken, [222] resumed the stand for further direct examination.

Q. (By Mr. McNabb): Mr. Sumter, were you able to find a copy of the project analysis?

A. Yes, I was.

Q. Would you show that to me, please. Could you remove it from your files. How did this instrument come into your possession, Mr. Sumter?

A. It was delivered to us from the National Bank of Commerce.

Mr. Hepp: I didn't hear the answer, sir.

Mr. Sumter: It was delivered to our office from the National Bank of Commerce, Seattle.

Clerk of Court: Defendant's Identification G.

(Project Analysis was marked Defendant's Identification G.)

Q. (By Mr. McNabb): By whom was this instrument prepared?

A. By the Juneau office of the Federal Housing Administration.

Q. Do you know when it was received by the bank?

A. The latter part of February or the first of March, 1950.

Q. Was that in company with other documents?

A. It was sent along with the, or the commitment for insurance and breakdown on the reserves and replacements. [223]

Q. Do you know whether this instrument is signed?

(Testimony of Glenn Roy Sumter.)

A. Yes, it is a signed copy.

Q. Are you familiar with the signature that is on it? A. No, I wouldn't.

Q. If you see the signature you will know whose it is? A. Yes.

Q. Now, I will show you the Defendant's Identification G, ask you for what purpose is that prepared?

A. It is the basis upon which the commitment is issued.

Q. Does that instrument indicate the amount of money that would have been available to construct the building the basis of which are these preliminary drawings? A. Yes.

Q. How much money would have been available to construct the building?

A. May I explain it? I mean I can't just pull a figure out.

Q. Yes, of course. I think the Court would expect you to or desire that you do that, would you not?

The Court: I don't know just what he wishes to explain.

Mr. Sumter: I was asked the amount available for construction.

The Court: Yes. Can you determine that from that document?

Mr. Sumter: Yes, I can, your Honor, but I would have [224] to start with the mortgage figure and deduct items which they set aside and are not available.

(Testimony of Glenn Roy Sumter.)

The Court: Then you may proceed and so explain it to the jury.

Mr. Sumter: The mortgage was in the amount of one million, six hundred ninety-four thousand, two hundred dollars. From that amount they deduct a hundred thirteen thousand, two hundred sixty-four dollars, which they classify as carrying charges and financing expenses. It is made up of interest during construction, taxes and so forth. Then from that figure you would also deduct the architect's fee which in this case was eighty thousand one hundred nineteen dollars. Deducting those two amounts from the one million six hundred ninety-four thousand two hundred you would arrive at the funds available for construction.

Q. (By Mr. McNabb): And what amount was that that deductions having been made or is it computed there?

A. It is not computed. You would have to compute it. It would be roughly a million five.

Q. And that under this commitment is the maximum amount that could have been used to construct the building if all of the other charges and expenses had been paid?

A. From mortgage proceeds, yes.

Q. Mr. Sumter, at the time that you submitted the application for the loan for the insurance, of all of the items that you [225] submitted, had Mr. Orsini assisted you in preparing or compiling any of that information?

A. None of it that went through our office.

(Testimony of Glenn Roy Sumter.)

Q. Did you submit the financial statement of Mr. Waxberg to any bonding company?

Mr. Hepp: Now, I object to that question. I don't think that that is relevant or pertinent here. This man says that he was not authorized to issue bonds.

The Court: He may answer.

Mr. Sumter: Yes, I did. I submitted it to three companies.

Q. (By Mr. McNabb): Was a bond issued on that application?

A. We did not submit it for, to obtain a bond but to determine whether or not they would accept the application for a bond.

Q. Did you receive a response to your inquiry?

Mr. Hepp: Just a moment, I object to that as pure hearsay. Not within the knowledge of this witness.

The Court: He can state whether he received a response, just yes or no.

Mr. Sumter: Yes.

Q. (By Mr. McNabb): What was that response?

Mr. Hepp: I object to that as hearsay. [226]

The Court: It is not the best evidence. Sustained.

Q. (By Mr. McNabb): Do you have any correspondence in your file to indicate the response?

A. No. I had a discussion with Mr. Hill.

Q. But you have not with you— (Interrupted)

A. I have no correspondence regarding the bond.



(Testimony of Glenn Roy Sumter.)

Q. Do you know whether a bond was ever issued to Mr. Waxberg?

A. Not to my knowledge.

Mr. McNabb: You may take the witness.

Cross Examination

Q. (By Mr. Hepp): Mr. Sumter, I understand you to say there was a commitment issued in this instance? A. Yes, there was.

Q. Does it follow from that that a bond is not necessary as of the time of the commitment, for a commitment?

A. A bond is only needed at the time of closure.

Q. But actually the issue of bonding of Mr. Waxberg was not of any immediate importance for the acquisition of a commitment, is that right, sir?

A. It had nothing to do with the issuance of the commitment.

Q. Had nothing to do with it at all?

A. No, sir.

Q. How large is your firm that you work with or for? [227] A. In what respect?

Q. In number of personnel? A. Six.

Q. There are six people employed?

A. Yes.

Q. And principal portion of your business during the periods of time which you have covered in your direct examination were in processing FHA applications or applications for FHA mortgage insurance?

A. I would say a good fifty percent of it.

(Testimony of Glenn Roy Sumter.)

Q. About fifty percent of it. You are not a money loaning institution yourself?

A. Yes, we are.

Q. You are? A. Yes.

Q. Did you consider loaning money on this project? A. No.

Q. You brokered the matter, I believe you testified to? A. Yes, sir.

Q. Just what is a broker, sir, in the sense that you use the word here?

A. You originate and obtain interim financing and permanent financing.

Q. In an instance such as the case at bar here, that is to say this application which was made to the FHA, you did the work of compiling the information on this application and submitted it [228] to the FHA, your firm did that? A. Yes, sir.

Q. Now, where do you get all your information for compiling that?

A. Well, the architectural exhibits are obtained from the architect. The miscellaneous exhibits are usually obtained from the sponsorship.

Q. Actually, Mr. Sumter then Mr. Waxberg could have done a considerable amount of work for the architect and still you would have had no direct dealing with Mr. Waxberg, is that, could that not have been?

A. That could have been, yes.

Q. The fact that you only had two or three conversations with Mr. Waxberg or in fact no conversations at all has no bearing on whether or not he

(Testimony of Glenn Roy Sumter.)

did work which directly or indirectly assisted in the filing of this application, is that true?

A. I believe I stated the work would have had to have been done prior to February the 4th.

Q. Sir?

A. I believe I clarified that that the work would have had to have been done prior to February 4th, 1950.

Q. For this application? A. Yes.

Q. Is it your experience customary for builders to work with architects in the compilation of data to submit plans and [229] specifications for a proposed building for which government insurance is applied for?

A. In most cases the builder is the sponsor.

Q. In most instances the builder is the sponsor?

A. Yes.

Q. Nothing unusual about Mr. Waxberg having been a builder here in this instance and, therefore, a sponsor? A. No.

Q. Could have done, so far as you know could have done quite a bit of work together with the architect in getting the material that you needed, is that right, as far as you know?

A. Yes, prior to February 4th, 1950.

Q. Mr. Sumter, how long does it generally take you to, or did it during the days of FHA how long did it usually take you to process an application into the FHA for mortgage insurance?

A. A week to ten days.

Q. A week to ten days. That is when all the

(Testimony of Glenn Roy Sumter.)

material was ready to go or when, what period of times does that contemplate?

A. I would say, well, I would say from the time we first discussed the case and its going to be developed it will take a week to ten days to get the architectural exhibits and the other information processed through our office or through the bank.

Q. You mean an architect can draw plans, figure out a building, draw plans like this in a week?

A. A week to ten days. [230]

Q. A multiple story building?

A. Yes, keeping in mind that those are not any more than an outline of the plan and an outline of the specifications.

Q. Well, how are the original figures for which an application is made determined then? I hear the figure one million six or seven hundred thousand dollars which you referred to, the application; how is that figure arrived at?

A. At the time this was processed the maximum loan in the Territory on this type was ten thousand eight hundred dollars per unit and it was quite generally felt that it was far below the cost in the Territory so I believe this figure was merely a projection of the ten thousand eight hundred per unit times the number of units proposed plus an allowance for commercial space.

Q. As of January of 1950 had you done very much business in the Territory of Alaska?

A. Oh, we had had about fifteen to eighteen million.

(Testimony of Glenn Roy Sumter.)

Q. Fifteen to eighteen million?

A. Yes, sir.

Q. I don't understand the figure, you mean as an aggregate of— (Interrupted)

A. Mortgage loans.

Q. Applications for mortgage loan insurance?

A. Mortgage loans placed, yes.

Q. Did, did Mr. Hill assist you in any way in the making out of this application? [231]

A. Not in making out the application. He supplied the exhibits which we needed.

Q. Would it have been entirely possible that Mr. Orsini may have supplied Mr. Hill with lots of the information that he in turn tendered to you in the form of exhibits or material that would be made into exhibits?

Mr. McNabb: Object to that until such time as the proper foundation has been laid for it.

Mr. Hepp: I believe, your Honor, it is directly in point of the direct examination.

The Court: He may answer.

Mr. Sumter: I wouldn't have any knowledge as to the source of these exhibits.

Q. (By Mr. Hepp): What kind of information did Mr. Hill submit to you?

A. Information that took probably five minutes to obtain up here. It is a zoning letter, a picture, a city map.

Q. A survey?

A. No, I believe the survey was furnished us through the architects.

(Testimony of Glenn Roy Sumter.)

Q. Mr. Hill didn't furnish that?

A. No, it is part of the architectural exhibits.

Q. Is there a financial statement of Mr. Hill as a part of this transaction?      A. Yes. [232]

Q. Do you get those in five minutes, Mr. Sumter?

A. I believe the financial statements of both Mr. Hill and Mr. Waxberg were delivered either at the time of our original meeting or shortly thereafter.

Q. I don't believe you responded to my question, do you get up financial statements in five minutes? You stated that Mr. Hill tendered the information to you that he could have obtained in five minutes. Now, I was just asking you a little bit more along those lines.

A. It all depends how you conduct your business.

Q. Well, has it been your experience that people get financial statements up in five minutes?

A. These statements were over thirty days old.

Q. I don't mean to be critical, Mr. Sumter, what I want to find out is what kind of information it was necessary for Mr. Hill to tender to you, the necessary information for you to make up an application and whether or not that could have involved such special services as a builder and a man like Mr. Orsini, if you know him?

A. Could it have involved them?

Q. Yes.

A. Well, I imagine it could have.

Q. They could have spent quite a bit of work

(Testimony of Glenn Roy Sumter.)

in getting the material which Mr. Hill supplied to you which culminated in your application to the FHA, is that right? [233]

A. Other than the financial statements I would say no.

Q. On which of these documents, Mr. Sumter, is there a listing of those exhibits which are necessarily accompanying?

A. It is application for mortgage insurance.

Q. Now of, I believe you read this list off once, list of exhibits. Now, I will read them through and you state which of these you compiled yourself and which you relied upon other people to give you.

The Court: Pardon me, counsel, what exhibit is that?

Mr. Hepp: This is Defendant's Identification B, entitled application for mortgage insurance.

Q. (By Mr. Hepp): There is a legal description, did you get that yourself or your company, Mr. Sumter, or was that supplied to you?

A. That was supplied to me.

Q. Letter re ownership?

A. We prepared that.

Q. You prepared that. On your own information or information that was given to you by Mr. Hill?

A. Mr. Hill's information.

Q. Letter re zoning?

A. Supplied by Mr. Hill.

Q. Photographs?

A. Supplied by Mr. Hill.

Q. City map? [234]

A. Mr. Hill.

(Testimony of Glenn Roy Sumter.)

Q. I see here FH 21 A Department of Labor form?

A. That was prepared by the architects, prevailing wage.

Q. Personal financial credit statement?

A. Mr. Hill. Mr. Waxberg.

Q. Form FHA 2013 E?

A. We prepared that.

Q. And four architectural exhibits?

A. Supplied by the architects.

Q. In your experience as a mortgage processor, Mr. Sumter, haven't you found that a builder has to rely quite a bit on quite a few tradesmen and crafts in order to compile the information that you require of him in order to successfully process an application, in your experience?

A. I don't believe so at that time.

Q. Why is it then that builders are often sponsors if they are not necessary?

A. I didn't say a builder wasn't necessary.

Q. As of the time of the commitment?

A. Well, then I misunderstood your question. You asked if it was necessary to contact all the subs.

Q. Oh, I don't believe I asked you that question, sub-contractors?

A. I misunderstood you.

Q. Talking about the people that get up financial [235] statements, zoning maps, general building plans, ideas, all those things which make up a



(Testimony of Glenn Roy Sumter.)

man's mind that he comes to you and decides he wants to build a building?

A. Well, their mind is usually made up before they come to me.

Q. Has it been your experience that builders are often sponsors by reason of the fact that they have been a very center part of that mind making before they come to you?

A. Well, as I stated before in ninety-five percent of our cases the builder is the sponsor.

Q. In this instance if you hadn't had another sponsor with Mr. Hill you would have been unable to get a mortgage as I understand Mr. Hill's finances were not adequate in themselves, is that right?

A. His cash position was not adequate. His financial statement was adequate.

Q. Well, is it reasonable to believe that by reason of the fact that there is a co-sponsor on there that it served some purpose?

A. I searched through my records. I don't find where Mr. Waxberg's financial statement went to Juneau.

Q. Why then was Mr. Waxberg a co-sponsor on this if you know?

A. Because of his participation of builder's fee.

Q. It would be highly speculative, would it not, Mr. Sumter, [236] to say that the commitment would have been issued had he not been on there, is it highly speculative to guess what the FHA might have done under those circumstances?

(Testimony of Glenn Roy Sumter.)

A. It was re-issued without his name on it.

Q. I am not talking about a re-issue. I am talking about this issue?

A. Could I have the question read.

(Thereupon, the reporter read the question.)

Mr. Sumter: No, I would not say it would have been highly speculative.

Q. (By Mr. Hepp): Just went along for the ride. No particular point in being on there except they decided to type his name in. Is that what you are asking this jury to believe?

A. I don't believe that is what you asked me.

Q. Well, in the course of your direct examination it seems as though numerous statements came from you indicating that you had had little or no conversation with Mr. Waxberg, that his position in this matter or purpose or usefulness was not very apparent and I would merely like to find out for my own satisfaction possibly for the jury, whether or not Mr. Waxberg served any useful purpose in this application for this commitment for Mr. Hill, in your opinion?

A. I believe, sir, what I said was that I had no knowledge of work that he might have done. [237]

Q. Could have done a lot?

A. He could have.

Q. Been very instrumental in the procurement of this whole thing?      A. What whole thing?

Q. The commitment, the ultimate issuance of a commitment?

A. No. Prior to the presentation of the com-

(Testimony of Glenn Roy Sumter.)

mitment or the application yes, he could have been.

Q. I mean the commitment is issued on the basis of an application?

A. That is true. You said base.

Q. I will rephrase it, use the word application?

A. Yes.

Q. Mr. Waxberg could have been very useful possibly even indispensable in compiling the information, getting the application ready for filing?

A. You mean the exhibits of the application?

Q. Yes.

A. That would be possible.

Q. Possibly even Mr. Orsini did some very valuable and essential work?

A. I haven't any idea what Mr. Orsini did.

Q. He could have as far as you know?

A. I don't know what Mr. Orsini does.

Q. I believe you testified that you, one of the purposes which you serve the public, or I should say strictly a portion [238] of the public in terms of your clientele is to screen applications so that project sponsors would not go ahead if it were unfeasible.

A. That is true.

Q. Did you screen this project? A. Yes.

Q. And it went ahead though to the point of making application for the loan? A. Yes.

Q. Now when did, if you know, the FHA as it applied to Alaska, Public Bill 608 I believe it has been referred to here— (Interrupted)

A. Title 6, Section 608.

Q. Is that in force now? A. No.

(Testimony of Glenn Roy Sumter.)

Q. When did it cease to exist?

A. I believe the last day of February, 1950.

Q. This then if I am to judge by the dates that have been mentioned in this cause slid under the deadline so to speak?

A. So far as 608 was concerned, yes.

Q. Now, did this commitment which was issued by the FHA, we are talking about, was that used in any way, of any ultimate commitments that might have been given to Mr. Hill for the building of any building such as the Polaris Building?

A. It was extended, I believe, for a year before it was reprocessed. [239]

Q. If that commitment had not been obtained could Mr. Hill have procured an FHA loan to build the Polaris Building? A. Yes.

Q. After the deadline?

A. That is only a portion of the housing act.

Q. Oh, I see, but did you go through under the same, in other words was there a new commitment issued or was there a revised commitment issued, if any?

A. It was a revised commitment.

Q. It was actually a revision of the original on which Mr. Waxberg was the sponsor, is that right?

A. Yes, I believe they referred to it as an amended commitment.

Q. Now, Mr. Sumter, after you had made up this application for Mr. Hill conceivably stopping at that point, had you earned any fees at that point?

A. No.

(Testimony of Glenn Roy Sumter.)

Q. With Mr. Hill? A. No.

Q. What was the arrangement with Mr. Hill for your pay or do you work for free?

Mr. McNabb: Just a minute, I am going to object to that as having no bearing on the issues of this case, improper cross examination.

The Court: I can't see the bearing. I will sustain the objection. [240]

Q. (By Mr. Hepp): I think in the course of your testimony you said that no drill log was submitted?

A. I said to my knowledge there was no drill log submitted at the time the application was sent in.

Q. That would be to the FHA?

A. That is right.

Q. Your statement was confined to that?

A. Yes.

Q. Would you be in a position to state that no drill log was necessary for the architect to compile the information that you deemed necessary to put in the application?

A. For the preliminary plans I would doubt if a drill log was necessary.

Q. Are you acquainted with that subject matter? A. Yes.

Q. Just what does an architect supply to you when you make an application for FHA, Mr. Sumter?

A. In the way of architectural exhibits?

Q. You mean like this.

(Testimony of Glenn Roy Sumter.)

A. Is that what you are asking?

Q. I mean what does he supply you with?

A. Supplies me with what, with a preliminary set of plans and an outline of specifications.

Q. Is it in your mind that a building can be designed even preliminarily to the extent which these plans show without having [241] some concept of the foundation that is necessary to support the building and the costs? A. Yes.

Q. They are not a factor?

A. The survey is a factor.

Q. I am talking about the foundation of the building? A. Is it possible to?

Q. To even get a summary idea of construction costs or building size within a limited budget without knowing foundation information?

A. Foundation information is usually obtained after the FHA commitment is issued.

Q. It is also a necessary part of an architectural, architects necessary information for drafting and designing a building though, is it not?

A. Definitely, especially in soil conditions such as you have up here.

Q. Where there may be permafrost or glacial conditions under the surface. Very important?

A. Yes, but not at that stage.

Q. Well, precisely just what is done when people plan to build a building and get a mortgage financed, how far do they usually go in their plans up to a point where you designate, or do they generally formulate the whole building, or do you know?

(Testimony of Glenn Roy Sumter.)

A. Until the plans have been processed through FHA you [242] hardly know what you are going to build. If you will look on the back of your commitment you will see twenty or thirty some items that require corrections to the plans. Also you will see an item there regarding foundation. There is no allowance given by FHA beyond a normal foundation.

Q. Sir?

A. I say there is no allowance given in costs by FHA beyond the normal foundation.

Q. But that information may have been extremely critical to Mr. Hill in deciding whether he wants to build a building or to an architect who is advising him whether or not the building he conceives is feasible?

A. I would say it would be impossible for the architect to complete his plans without finding out what is in the ground.

Q. A drill log then, Mr. Sumter would, is not a useless piece of information, is it?

A. Certainly not.

Q. A very necessary part of information at one phase or another, one stage or another of the building?

A. That is the start of the building.

Q. Where are you staying here in Fairbanks?

A. Over at the Polaris.

Q. Are you guest of the Hills?

A. Yes, I am.

Q. I believe you made a statement that it was

(Testimony of Glenn Roy Sumter.)

something in [243] terms of not necessarily, to get government insurance on a mortgage, that private capital is available for building large buildings or some words to that effect; in other words whether or not the FHA, RFC or some other government money, I think that counsel used, you indicated in an answer or did you that government money is not indispensable in building a building; that brokers do farm out loans or arrange for loans that are not necessarily FHA financed or guaranteed?

A. Well, to clarify what I thought was asked me, whether or not FHA invests or lends money in connection with these loans, which is not the case.

Q. No, I don't believe that was my question. I will rephrase the question to you. Have you ever brokered a loan at a level of one and a half million dollars or more without a guarantee up here in the Territory of Alaska?      A. No, sir.

Q. FHA, RFC or some government source was virtually indispensable in Mr. Hill's financing and building up here then of the size and magnitude which he contemplated?

A. The insurance was necessary.

Q. The insurance?      A. FHA.

Q. Well, that is sort of a guarantee the government guarantees that the money loaner will not lose or at least a certain percentage of his money or something? [244]

A. Well, it is FHA insurance as against the GI or veterans guarantee.

Q. But you have never brokered a loan of that



(Testimony of Glenn Roy Sumter.)

magnitude without having a government guarantee of some sort, insurance, I mean government money as it is sometimes loosely referred to?

A. Without insurance. We have sold many loans up here with insurance to private lenders but only with insurance.

Q. But they all involved a government agency at one way or the other at the level of a million and a half or more, is that right, the ones you have had experience with? A. Yes, sir.

Q. Would you undertake to process financing a building through a money lending organization of a million and a half dollars for the type of building which Mr. Hill conceived and planned without going to a government agency beforehand and obtaining a commitment; would you undertake that project if somebody were to come into your office and say, I would like to buy a million dollars and a half, or ninety percent of a million dollars and a half to build a building up in Fairbanks; do you think you would, you could farm that loan out unless a government insurance or government guarantee of some sort? A. I do not.

Q. The participation of government is indispensable?

A. In the Territory, I would say yes.

Q. To Mr. Hill as well as others? [245]

A. Yes.

Mr. Hepp: I believe that is all the questions we have of this witness.

(Testimony of Glenn Roy Sumter.)

Redirect Examination

Q. (By Mr. McNabb): Mr. Sumter, I believe that in Mr. Hepp's examination, or cross examination he asked you a question substantially as follows. Could not Mr. Waxberg have supplied information which was very useful or practically indispensable which was submitted with the application. What information could Mr. Waxberg have collected which was practically indispensable?

A. It would have to be in connection with the plans.

Q. What could that have been, sir?

A. Well, I really don't know.

Q. You have no way of knowing?

A. I have no way of knowing.

Q. At what stage of the proceedings do the costs of construction become important?

A. After the commitment is issued and you meet the requirements of FHA.

Q. And only then?

A. Prior to that date your costs have little meaning except the feasibility of erecting the building.

Q. At the time of the preparation of the preliminary plans, preliminary specifications up to that times does the architect make any estimate of the cost of construction? [246]

A. I notice on the application they list under "A" architectural exhibit trade payment breakdown. I don't have a copy of it and I really don't know

(Testimony of Glenn Roy Sumter.)

how it was prepared, but it would parallel the application figures.

Q. But let me ask you this, until such time as there is a commitment issued so that you then know how much money is available costs of construction are not critical, are they?      A. No.

Q. Was there another section of the, or another applicable act under which this building could have been constructed?      A. Yes.

Q. Did it expire on the 28th of February of 1950?

A. It is part of the permanent housing legislation and it is still in effect.

Q. And that would have covered this building as well?      A. Yes.

Q. Mr. Sumter, at the time of the preparation of the final plans for a building is a drill log of the ground, of the location of which the building is to be constructed an important item?

A. At the time the final plans are being prepared?

Q. Yes.      A. Definitely.

Mr. Hepp: Excuse me, your Honor. I am going to object to that unless he states important to whom. I don't understand. It is a very general question. It may be extremely important to [247] the architect and an absolute matter of indifference to a broker.

The Court: I believe the objection is well taken and the important to whom should be emphasized in the question. Objection sustained.

Q. (By Mr. McNabb): I believe you made some

(Testimony of Glenn Roy Sumter.)

statement concerning FHA allowing only a specified amount for foundation, is that true?

A. I believe what I said is that they disallow any excess costs of foundation beyond that of the normal.

Q. So then in the preliminary plans which are submitted with the application all that is necessary is a plan which is made in conformity with FHA requirements which is universal throughout the United States and Alaska?

A. No, it is not that universal. It is in areas covering certain groups of states.

Q. Then for so long as the preliminary plans are in conformity with the requirements for the particular area that is all that is necessary?

A. Yes.

Q. And regardless of the condition of the ground for so long as the original plans meet the FHA requirements that is all that is necessary?

A. In so far as preliminary plans are concerned.

Q. And the actual condition of the ground does not become important until such time as final plans are in preparation, is [248] that true?

A. That is right.

Q. Consequently the conditions of ground upon which this building was to be constructed was not important to anyone in the preparation of the preliminary plans?

Mr. Hepp: I object to that, your Honor. This is a redirect examination and that is a, I mean it

(Testimony of Glenn Roy Sumter.)

calls for a yes or no answer. We object to that form of a question.

The Court: Sustained as leading and suggestive.

Q. (By Mr. McNabb): Was a drill log of the property upon which this building was to be constructed necessary or essential to the preparation of the preliminary plans?      A. No.

Mr. McNabb: We have no further questions.

### Recross Examination

Q. (By Mr. Hepp): Mr. Sumter, now FHA, if FHA disallows excess costs and foundation which necessarily would be a matter of additional private financing of a builder wouldn't the idea of foundation costs be of utmost importance to a builder in terms of feasibility whether he is going to go ahead if he has to carry the excess costs as a matter of private financing, you say it being disallowed, the excess?

A. It would certainly be of interest to someone.

Q. To the builder, to Mr. Hill would it be?

A. Whoever was going to pay for it I would say.

Q. Well, in the case of the building, of Mr. Hill's building who would pay the excess costs over and above that which the mortgage money would cover as guaranteed by the government or insured by the government, wouldn't Mr. Hill be paying for them?      A. Yes, certainly.

Q. Wouldn't it be of utmost importance to him to know whether there were going to be excessive

(Testimony of Glenn Roy Sumter.)

costs before he even so far as bothered to start an application?

A. The theory of preliminary processing is to hold the costs down to the sponsorship until they obtain a commitment.

Q. Well that, sir, may be your part of this whole thing, but projecting it from Mr. Hill's point of view, would your answers be the same as to what is important? I am gathering that you deem important those things which you need to get an application through, that is something a little bit different or maybe than what Mr. Hill wants to know before he decides to even pay you or anybody else to run through an application and go through the fuss of trying to get a commitment, is that not right?

A. Well, I don't know what Mr. Hill deems important.

Q. Your answers are confined then to just what you need as a broker and not what is necessarily needed in a project like this, is that right?

A. I deem those things important that are needed for the [250] processing of the application.

Q. There may be many other things that are very important to Mr. Hill?

A. That could be very true.

Q. Now, you say there is another section under which this building could have been built; why didn't you use that instead of revising this original commitment?

Mr. McNabb: I object to that as not being proper recross examination; not within the issues.

(Testimony of Glenn Roy Sumter.)

The Court: Overruled. He may answer.

Mr. Sumter: The matter of fees. He paid three and a half per thousand for the processing of this application. In order to switch to a Section 2070 he would lose his entire fee. Also the charter under which the 608's were controlled by the Federal Housing Administration was far more lenient than the charter under Section 207.

Q. (By Mr. Hepp): Do you know what three percent of this building would amount to?

A. I am sorry, three-tenths of one percent.

Q. How much would that amount to?

A. Around forty-eight hundred dollars.

Q. Forty-eight hundred dollars, and you say in addition to that the law under which the original 608 was considerably more lenient? I didn't quite understand you. [251]

A. The charter that the FHA requires was far more flexible as to how you operate under 608 than it is under Section 207.

Q. How you operate the building or operate what?

A. These projects are controlled by the ownership of stock, preferred stock held by the Federal Housing Commission. They exercise controls over the operation through the ownership of this stock and as such he injects certain controlling articles into the charter.

Q. Well, in summary form the fact that you did get the commitment which Mr. Waxberg co-sponsored revised rather than going ahead was done

(Testimony of Glenn Roy Sumter.)

for a good reason and, therefore, we can assume, can we not, that that commitment was of some value or otherwise you wouldn't have had it revised but would have gone ahead under the new law, is that right, sir?

A. Yes, it was worth forty-hundred dollars.

Q. In terms of cash, and in terms of leniency and operation it could be an unmeasurable value but nevertheless in terms of dollars and cents of considerable value to an owner, is that right?

A. Yes.

Q. In fact for years to come Mr. Hill could profit as an owner one way or the other directly or indirectly by the fact that you had revised the commitment which Mr. Waxberg co-sponsored, is that right?

A. I don't think the charter controls are of that *important*.

Q. Sir? [252]

A. I say I don't believe the charter controls are of that importance.

Q. What importance are they?

A. One is a little easier than the other, but it is nothing you would reject over the years as benefits.

Q. Up to this point then at least there have been benefits gained under the commitment which Mr. Waxberg co-sponsored?

A. I think the forty-eight hundred dollars or thereabouts is.

Q. In terms of cash?

A. Is the greatest import.



(Testimony of Glenn Roy Sumter.)

Q. You couldn't categorically state from that stand that you could put this thing together and broker it under the new law. You might believe you could. Can you categorically state you could have?

A. Yes.

Q. Yes?

A. Yes.

Q. How do you know what the FHA is going to do, you have an inside track?

A. The title 2, Section 207 has been on the books since 1938. It was never used during the period of time that 608 was available. The processing is identical or was at that time, I should say.

Q. You can state categorically that you could put an application through under a different section.

A. Well—(Interrupted) [253]

Q. I am not asking you whether you have had good success in the past. I am asking you whether you could state categorically that you could do that?

A. I would say yes.

Q. You know what a government agency is going to do. They will approve an application of yours?

A. You asked me if I could put a similar application through as I understood you.

Q. And receive a commitment. I mean I suppose anybody could file a paper?

A. Sir, I told you no one knows they are going to receive a commitment until it is issued.

Q. Then you cannot categorically state that the application you put in in behalf of Mr. Hill would

(Testimony of Glenn Roy Sumter.)

have resulted in a commitment under a different law than 608?

A. I can never state when I put an application in that it is going to result in a commitment, but I could file the same application that I did under 608.

Q. Why did you file under 608?

A. Because it was still in existence and they were not using 207.

Q. And to save forty-eight hundred dollars?

A. The law had not expired when we filed this.

Q. I am talking about an application for revision now?

A. Why would we file a new application when we had one [254] outstanding?

Q. I don't know. I am asking.

Q. What did you ask me.

The Court: I believe the witness has answered that.

Mr. Hepp: I believe so. I will withdraw any further questions. Excuse me, I believe we have no further questions.

The Court: It is three o'clock and members of the jury I ask that you, please, heed the admonition previously given to you and we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:00 p.m., the Court took a recess until 3:10 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: The parties wish to stipulate that the

(Testimony of Glenn Roy Sumter.)

twelve persons in the box are the jurors duly impaneled and sworn to try this cause?

Mr. McNealy: The plaintiff will so stipulate.

Mr. McNabb: The defendant will so stipulate.  
Are you finished with Mr. Sumter?

Mr. Hepp: We are, sir.

(Witness excused.)

Mr. McNabb: Mr. Waxberg, will you take the stand, please.

### A. E. WAXBERG

the plaintiff, called as a witness in behalf of the defendants, [255] having been previously sworn, resumed the stand and testified further as follows:

### Direct Examination

Q. (By Mr. McNabb): Mr. Waxberg, do you recall the first occasion upon which you talked to Mr. Hill concerning the construction of a building?

A. As I recall it was in December of 1949.

Q. Do you recall when in December of 1949?

A. No, I don't.

Q. I believe you previously testified that that conversation took place in your office?

A. It did.

Q. And Mr. Berklid may have been around?

A. He may have.

Q. Do you recall how many times you discussed the construction of the building with Mr. Hill in December?      A. No, I don't.

Q. Was it more than one time?

A. It was continuous until the time I was out.

(Testimony of A. E. Waxberg.)

It might have been every other day; two weeks might have gone by, but it was continuous conversation on, on building from, until I was let out of the building.

Q. Well, you do know that Mr. Hill wasn't in Fairbanks all of December, do you not?

Mr. Hepp: Now, I object to that unless there is some showing that this witness would know where Mr. Hill was. [256]

Mr. McNabb: It doesn't make any difference where Mr. Hill was.

The Court: You can ask him if he knows.

Q. (By Mr. McNabb): Do you know where Mr. Hill was, whether Mr. Hill was here all of December? A. No, I don't.

Q. Do you know that he was not here part of December?

A. I do remember they went down to visit their boys, but I don't know how long they were gone or anything about it. When they left or when they came back. I do know they were out visiting their boys.

Q. Now, there was some discussion if I recall correctly concerning the construction of a building, the plan for which was prepared by Alaska Architectural?

A. It was just a preliminary drawing, one sheet, I believe it was.

Q. Did you discuss that during December or subsequent to December?

Mr. Hepp: I object to that, not within the is-

(Testimony of A. E. Waxberg.)

sues. Besides repetitious, was gone into by counsel on the previous examination.

The Court: He may answer.

Mr. Waxberg: How was the question again?

Q. (By Mr. McNabb): Did you discuss construction of the building as outlined [257] by the one-page draft by Alaska Architectural Engineering with Mr. Hill in December?

A. Must have. Yes, to some extent.

Q. Do you recall now how much of that time was spent discussing that building?

A. No, I don't. It couldn't have been, it couldn't have been very much because it was, as I recall it, it was nothing that we wanted to go through with.

Q. I'm sorry, Mr. Waxberg, will you say that again, please?

A. I say I couldn't have discussed it with him very many times because as I remember it was decided very shortly that it wasn't what he wanted to go through with.

Q. Who decided that?

A. Well, possibly Mr. Hill upon my advice or he might have taken it upon himself. I don't know.

Q. What advice did you give Mr. Hill in that regard? A. Well, I don't remember.

Q. Did Mr. Hill say to you that he had abandoned that idea?

A. I don't recall that.

Q. Do you now recall what sort of a building it was? A. No, I don't.

(Testimony of A. E. Waxberg.)

Q. Did you do any investigating at all concerning the construction of that building?

A. Not that I remember of.

Q. Do you know how much was, what was the first building; [258] do you know what the first building was that was discussed by you and Mr. Hill?

A. No, I don't. I don't remember.

Q. And you don't recall how much time you spent discussing that?

A. No, I don't remember.

Q. Do you know whether you spent the entirety of the time between the first meeting and when Mr. Hill went to visit his boys concerning that building?

A. That I don't know. I don't know when Mr. Hill went to visit his boys.

Q. During the month of December did you discuss the construction of another building?

A. That I don't remember.

Q. You may then have spent the conversations that you had in December discussing either the construction of any building or the construction of the particular building the preliminary draft of which you had which was prepared by Alaska Architectural?

A. I suppose so.

Q. When, at what stage of the proceedings—let me ask you this. Did you have any personal conversation with Mr. Hill that you now recall between the time that Mr. Hill went outside to visit his boys and when you saw him in Seattle on the 29th day of January?

A. It is pretty hard to remember. [259]

(Testimony of A. E. Waxberg.)

Q. Well, do you have any present recollection of such a discussion, meeting with him?

A. Well, I feel that I have had through phone calls or else seeing him, one or the other, or I wouldn't have been able to have been instructed to get a drill log. Maybe I talked to the architect, I don't remember, but it was in January I had this drill log made.

Q. Did you ever agree with Mr. Hill to construct the building as represented by the drawing of Alaska Architectural?

A. I don't remember that conversation at all, or anything about that.

Q. When did, or do you have any recollection now of when you agreed to build a building for Mr. Hill?

A. Well, it was a mutual agreement on this FHA where I was co-sponsor, but what time we started that I don't remember, sponsored it, form of mutual partnership I should say.

Q. Do you now have any recollection of Mr. Hill telephoning you while he was outside?

A. Numerous times, yes.

Q. Was it during a conversation, a telephone conversation that you agreed with him to construct a building?

A. That I don't remember.

Q. The construction of any building—let me ask you this, was the construction of a building by you for Mr. Hill contingent upon the happening of any event? [260]

A. Providing we get the commitment, yes. That was the agreement.

(Testimony of A. E. Waxberg.)

Q. The money had to be available first?

A. That's right.

Q. Do you have any recollection now of when you first became aware that Mr. Hill was going to attempt to secure an FHA loan?

A. I don't remember the date, no.

Q. Do you have any recollection of how you received that word?      A. No, I don't.

Q. Do you know what month it was?

A. No, not other than from the application for a loan or a commitment.

Q. Well, of course, there must have been some preliminary discussions prior to the date that is on it?      A. Yes, should have been.

Q. Sure—(Interrupted)

A. But I don't remember any dates, no.

Q. You don't recall now how long before this application was dated that you had any such agreement?

A. No, I don't. It could have been one week. It could have been two weeks. Might have been longer than that as far as I know.

Q. Mr. Waxberg, what days did you work on this project? [261]      A. What days?

Q. Yes, days.

A. I don't remember. I can't remember that.

Q. Well, do you have any present recollection of how did you arrive at the forty-three days?

A. Well, it was time that I spent in Seattle mostly and some of the time here getting the Williams Equipment for the drilling and spending some



(Testimony of A. E. Waxberg.)

time with Philleo. I distinctly recall getting Philleo out on Sunday. He was reluctant in working but we had to have it so Philleo had his men working on Sunday. I can well remember that.

Q. Now then, the time that you spent in Seattle, is that represented by the hotel bills?

A. I imagine so. The time also, the trip to Juneau was spent.

Q. That was a part of the Seattle business?

A. That was part of it, yes.

Q. So then from the Munson Motor Court we have a receipt for January 29th to February 1st, that is 29th and 30th, 31st and 1st, four days?

A. Yes.

Q. March the 8th to 15th is seven days at the New Washington eleven days, March the 1st and 2nd at the New Washington?

A. I believe you had better look at that again. I believe it says from March the 2nd dash 27th.

Q. Oh, you are right. I'm sorry. These are hooked right up against each other then, aren't they?

A. Practically, yes.

Q. First to the 7th and the 8th to the 15th.

A. This is the original you see, and this is a copy, because I didn't have all of it.

Q. This is a duplicate statement?

A. A duplicate, I mean.

Q. So there is fifteen and four is nineteen days. I thought we had another hotel bill. Here it is, 4th, 5th, 6th and 7th.

A. Umm-umm.

(Testimony of A. E. Waxberg.)

Q. Four days at the Gowman and our little Juneau trip, that was just one day?

A. I think that was just two days.

Q. Two days?

A. One day going in, stayed there one night, I believe.

Q. Two days.           A. Was it two days.

Q. Twenty-second to 24th. Now then, was Mr. Hill present in Seattle at the time all of the time that you were there during these trips?

A. I believe so.

Q. Now then, that leaves us some place short of forty-three days. How many days did, did you stay down there with the [263] Williams Equipment people at the time that they were doing that drilling?

A. Well, no, but I was looking after it and I was no doubt figuring on this work, too.

Q. You were what, Al?

A. Figuring on helping them and telling them where to drill, making out the papers so I might have spent a day or two on that.

Q. There was just one day that they drilled, wasn't there?

A. Well, that I don't remember. It was one day moving in and drilling. There was only one corner that we were concerned about that we could possibly drill in. I guess it was about that. I don't remember. One or two days. I don't remember.

Q. Does this bill that Williams Equipment Company sent you, does that represent all of the drilling

(Testimony of A. E. Waxberg.)

that Williams Equipment Company did down there?

A. I imagine so. Drilling and thawing. The ground was frozen. It was quite an operation.

Q. Do you believe this bill to be accurate?

A. I have no reason to believe that it isn't.

Q. They drilled three holes twenty-two feet deep each. How big was this building?

A. What building?

Q. The one to be constructed, the one here fronting on Second, First and Lacey?

A. It covered the entire block. [264]

Q. Do you believe that you could anticipate the ground under the entirety of the building as represented by these preliminary plans by only three twenty-two foot holes?

A. I'm glad you asked me that question because I have been living here for eighteen years and I have done a lot of work around here. I saw the Greimann Building, the basement dug there. I observed the footing there and I put in the footing for the Lacey Street Theater and I called it to Mr. Hill's attention that it would be advisable to drill this particular corner because I noticed in the corner of First and Lacey on the Lacey Street Theater we run into some very bad ground. Otherwise the footing would only have to go down about four or five feet, six feet at the most, but I anticipated a deep footing there and for that reason I called it to his attention to have it drilled.

Q. Now then, you think that this is all the drilling necessary though to prepare the plans, make

(Testimony of A. E. Waxberg.)

the drawings for a building for all of the footings for that entire building?

A. With what previous knowledge I had of the ground and surrounding ground why there was only one thing in question that would be pertinent to size of footings required and so forth.

Q. Mr. Waxberg, you didn't answer my question. Would the architect, would any architect have designed the footings for a building this size and in Fairbanks on the basis of drilling in the corner of First and Lacey?

A. He would have to get some knowledge. If there was no [265] one there to tell him what the surrounding ground was he would certainly have to drill. He would have to drill more.

Q. Do you know the condition of the ground for instance at the corner of First and Lacey?

A. Within twenty feet, yes.

Q. What do you mean, within twenty feet?

A. Well, across the street.

Q. Do you know what the back, the depth of this building as it runs east and west on Second?

A. I don't know, it is probably fifty, seventy feet, something like that as I recall it.

Q. This, you don't believe that this three holes twenty-two feet long is sufficient information upon which to design the footings for a building the size of this?

A. Under the circumstances for a preliminary drawing.

Q. I know that, Al. That is not what I am asking

(Testimony of A. E. Waxberg.)

you. I am asking, I am talking about the drawings, the specifications, not the specifications but the detailed plans of the footings.

A. Oh, I suppose not when you come right down to the final.

Q. Not when you start to prepare the final plans for the things?

A. Then you would possibly have to drill more holes.

Q. Sure. Mr. Waxberg, to your knowledge were there more plans and specifications prepared for this building by Chiarelli and Kirk than are represented by the ones that are here now? [266]

A. I don't remember. I know they were working on it straight through as long as I was there but whether there was any of them completed, I doubt very much.

Q. At the time that you were in Seattle and with Mr. Hill, I believed you testified now that Mr. Hill was present in Seattle all of the time that you were represented there as represented by your hotel bills?

A. As I recall it, yes. Might be one time that he wasn't there. He might have been up here. I was down there.

Q. Did you at any time while you were down there with Mr. Hill ever ask him to pay your hotel bill?

A. No, I didn't.

Q. Or to pay your airplane fare?

A. No, I didn't.

Q. Or your meals?           A. Nope.

Q. Did you ever ask him for any money?

(Testimony of A. E. Waxberg.)

A. No.

Q. Did you expect or intend at the time you were down there or while you were here working on this thing to charge Mr. Hill for that work?

Mr. Hepp: I object to that question as repetitious. The matter has been gone into. We will be here until next month.

The Court: He may answer.

Mr. Waxberg: Ask that question again, please.

Q. (By Mr. McNabb): I say, at the time that you were working on this project did you intend to charge Mr. Hill for that work?

A. Well, not with the mutual agreement that we had, if the commitment was to go through, if the commitment went through I was to build the building and I had no intentions to be, I never even dreamed of getting kicked out of the deal. That is the bad part of it. If I had ever thought of that I would have had a written contract before we started, before I ever spent five minutes on it I would have had a written contract.

Q. Well, every time then for instance did you not spend some money on the Nenana School job prior to the time that you got the bid?

Mr. Hepp: Now, I object to that, your Honor. That is a contract price where an invitation to bid is set out and competitive bidding is made. This is not a comparable situation. That doesn't tend to settle any of the issues before this court. I object to it.

The Court: Objection sustained.

(Testimony of A. E. Waxberg.)

Q. (By Mr. McNabb): You did not though intend to charge Mr. Hill for the work which you did for—(Interrupted)

Mr. Hepp: I object to that as repetitious. He has answered it just two questions back.

The Court: It is repetitious but I am going to let him answer it. [268]

Mr. Waxberg: I have answered it. Already answered that same question just a minute or two.

Q. (By Mr. McNabb): Well, how did you answer it?

The Court: It is true that you have been asked that and you have answered it but I am permitting you to answer it again.

Mr. Waxberg: You are permitting me to answer it again?

The Court: Yes.

Mr. Waxberg: I had no intentions of charging him for this work because I figured that I was going to be the builder on, it was an agreement that I was to be the builder on this providing we get this FHA loan and I certainly would not have spent five minutes on it if I thought he would break his word and kick me out on the deal.

Mr. McNabb: You may cross examine.

Mr. McNealy: If the Court please, I don't know if we will have any questions to ask of Mr. Waxberg. There is a matter some of the attorneys and the Court are interested in and I dislike, your Honor, to make such a motion at this time but I

(Testimony of A. E. Waxberg.)

would like to move for a recess until ten o'clock tomorrow morning?

The Court: The defendants have any objections? McNabb any objections to a continuance to ten o'clock tomorrow morning?

Mr. McNabb: Certainly not, your Honor. I would like to be heard a couple of minutes after the Court excuses the jury, if I may, please. [269]

The Court: Members of the jury, there are special and valid reasons for permitting the Court to take, to terminate early today, one of them being that there is a lawyers' picnic in progress. I don't suppose we are supposed to have held Court at all this afternoon, but we have accomplished something and I will excuse you until ten o'clock tomorrow morning, but I admonish you again not to discuss the subject matter of this trial among yourselves, or with anyone; and do not express any opinion until the case is finally submitted to you. You are excused until ten o'clock tomorrow and I wish Mr. Erickson, if you will approach the bench on the way out. If you will just come up and see me on your way out, Mr. Erickson. You may step down there, Mr. Waxberg.

(Thereupon, the jury withdrew from the courtroom and the following proceedings were had out of the presence and hearing of the jury):

Mr. McNabb: If it please the Court, again I would like to move the Court for a directed verdict now on the third amended complaint. This sounding



in quantum meruit and it being the testimony of the plaintiff that at the time the services were rendered that he did not intend to be paid for them, did not expect to be paid for them, had no intention of making a charge for them; that any money that he received for them was to be the result of his profit from the building and quantum meruit is not founded on that sort of, at least our impression that that is not the concept of quantum meruit.

The Court: Mr. McNabb, I believe the case is in the same state of affairs that it was so far as testimony is concerned as it was when this matter was previously argued and the Court has no quarrel with any of the authorities cited this forenoon, but I don't believe that they are applicable to this situation. This is not in accordance with the authorities cited by you in my opinion. I am going to state to counsel there is no juror present that I am still somewhat perturbed about the matter, but it seems to me that this man, he didn't render services, Mr. McNabb, according to the testimony, with no expectation of compensation. He didn't expect or have any agreement for dollars and cents payment by the Hills to him, but he expected something in return for his services under his theory and what he expected in return was a contract and that is the thing of value and not money that he did expect. That is the Court's theory at this time and I will deny the motion at this time. Adjourn until ten o'clock tomorrow morning.

Clerk of Court: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:00 p.m., the trial of this cause was adjourned until 10:00 a.m., August 4, 1955.)

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., August 4, 1955, plaintiff and defendant both represented by counsel, the Honorable Vernon D. Forbes, District Judge, presiding: [271]

Clerk of Court: Court is now in session.

The Court: You may proceed with the polling of the jury.

(Thereupon, the Clerk of Court proceeded to call the roll of the jury.)

Clerk of Court: They are all present, your Honor.

The Court: Parties ready to proceed?

Mr. Hepp: We are ready, your Honor.

Mr. McNabb: Defendants are ready.

The Court: Very well, proceed.

Mr. McNabb: Call Mr. Hill, please.

### RUDELL P. HILL

one of the defendants, called as a witness in his own behalf, was duly sworn and testified as follows:

#### Direct Examination

Q. (By Mr. McNabb): Would you state your name please?      A. Rudell P. Hill.

Q. Where do you reside, Mr. Hill?

A. In Fairbanks.

Q. How long have you been a resident of Alaska?      A. Fifteen years.

(Testimony of Rudell P. Hill.)

Q. Are you acquainted with Mr. Waxberg?

A. I am.

Q. When did you make his acquaintance?

A. Personally, I believe in 1949. [272]

Q. Do you have any recollection of the circumstances that caused your first meeting?

A. Mr. Orsini introduced me to him.

Q. When did that meeting take place?

A. In December, 1949.

Q. Do you recall the part of the month?

A. It would be early part of the month.

Q. Where did the meeting take place?

A. Mr. Orsini's office.

Q. Who was present that time?

A. Mr. Orsini, Mr. Waxberg, and myself.

Q. Was the meeting by a pre-arrangement?

A. Yes.

Q. At whose arrangement?

A. Mr. Orsini's.

Q. For what purpose was the meeting called?

A. To see if I would approve of Mr. Waxberg being a contractor for me.

Q. I'm sorry. I didn't understand you.

A. To see if Mr. Waxberg would be suitable to me as a builder in a projected building.

Q. You were at that time proposing to construct a building?      A. I was, yes, sir.

Q. What type of a building?

A. A three-story commercial building, office space and commercial on the street floor. [273]

Q. Had you at that time any plans for such a

(Testimony of Rudell P. Hill.)

building, any actual plans prepared by an architect?

A. I am not sure whether I had those plans at that date or a few days later.

Q. Where was that building to be located?

A. Between First and Second on the, on the other side of Lacey.

Q. That is the east side of Lacey Street?

A. Yes.

Q. Was it to extend the entire distance from First to Second?      A. Yes.

Q. And front on what streets?

A. First and Second and Lacey Street.

Q. What was Mr., or what was Mr. Orsini's interest in that building, if any?

A. He had approached me for a location in that building and had offered me advanced rental on that location to help finance it.

Q. Where did he want a location?

A. On the corner of Second and Lacey.

Q. Do you know the purpose for which he wished it?

A. I was told at the time that it was for a bank.

Q. Why did he arrange this meeting with Mr. Waxberg?

Mr. Hepp: Now, I object to that unless it is within [274] the knowledge of this witness why another man did something.

The Court: Sustained.

Q. (By Mr. McNabb): Do you know why he arranged a meeting with you with Mr. Waxberg?

(Testimony of Rudell P. Hill.)

Mr. Hepp: Yes or no.

Mr. Hill: I partly no. I don't know the full story.

Q. (By Mr. McNabb): Well, what do you know about it?

Mr. Hepp: I object to that unless the foundation is laid how he would know and whether or not it is hearsay within the knowledge of this witness.

The Court: The answer might result in some damage. I will sustain the objection.

Q. (By Mr. McNabb): You knew previously, that is prior to this meeting that Mr. Orsini was to arrange a meeting with you and Mr. Waxberg?

A. I did.

Q. Did he tell you why he wanted to have the meeting?

Mr. Hepp: I object to that. There is nothing in any conversation like that that would bind the plaintiff in this cause, not within the issues before this Court; purely hearsay as to what somebody else thought they were going to do; why they said they were going to do something.

The Court: I will permit the answer. [275]

Mr. Hill: Could I have the question again, please.

(Thereupon, the reporter read the question.)

Mr. Hill: Because he had suggested Mr. Waxberg as the contractor.

Q. (By Mr. McNabb): Was Mr. Orsini an employee of yours at that time?           A. No.

Q. Did you have the meeting?           A. Yes.

(Testimony of Rudell P. Hill.)

Q. What was discussed at that meeting, Mr. Hill?

A. The possibility of building as we had planned at that time.

Q. Was there any discussion concerning financing that building?

A. It was planned at that time, I don't remember the exact discussion but it was planned at that time to finance it under RFC, Reconstruction Finance Corporation.

Q. Is that a governmental agency?

A. Yes.

Q. What was the extent of the discussion between you and Mr. Waxberg at that time concerning the construction of the building?

A. Merely if he would be interested in the contract to build it.

Q. Did you make that inquiry of him?

A. Yes. [276]

Q. What was his reply?

A. Very much interested.

Q. Did you have any subsequent meeting with Mr. Waxberg during the month of December in that regard?

A. I don't remember.

Q. Were you in Fairbanks during the entirety of the month of December?

A. No.

Q. Where were you?

A. In San Diego.

Q. When did you go to San Diego?

A. Approximately, I don't remember the exact date now. Approximately about the 15th.

Q. Of December?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. Did you make any inquiry while you were away from Fairbanks concerning the construction of a building as you have discussed it?

A. Yes.

Q. And with whom did you discuss it?

A. After the holidays, after the first of the year we came back to Seattle, my wife and I. At that time we went to the RFC office, the National Bank of Commerce and other places to find out if our project was possible or feasible.

Q. And what did you discover? [277]

A. We discovered that for certain reasons that the RFC financing was not feasible for us. One was that they lent a much smaller proportion of the cost of the building than did FHA. The other was that they planned a ten-year repayment instead of a thirty-year, which was possible under FHA.

Q. What did you do then as regards continued efforts to secure RFC financing? A. Nothing.

Q. Did you proceed on a new course then?

A. I did.

Q. What did you do?

A. We arranged with architects and planned an apartment building instead of an office building under FHA.

Q. Did you have any discussions or any correspondence or communications with Mr. Waxberg as regards a different type building than the one which was originally discussed?

A. That is quite probable. I don't remember specific conversations, sir.

(Testimony of Rudell P. Hill.)

Q. How did you proceed, Mr. Hill, in reference to the construction of an apartment building?

A. The National Bank of Commerce, I will have to explain something of the procedure in those cases. Those applications must go in through a bank. The National Bank of Commerce referred us to Mr. Sumter as a man capable of helping us prepare an application which they would see fit to send in.

Q. Which the bank would see fit to send in?

A. Yes.

Q. Did you go to Mr. Sumter? A. I did.

Q. What did he do, Mr. Hill?

A. He discussed the proposition and the probabilities, told us what equities we would have to produce, what was needed on our part and what was needed on the architects' part, what plans and exhibits would have to be submitted for the insurance for the loan.

Q. And after that discussion with Mr. Sumter, what did you do?

A. I immediately proceeded to supply him with information enough so that he could prepare the application.

Q. Was the application prepared?

A. Yes.

Q. I will show you the Defendant's Identification B and ask you if you know what that is?

A. That is the application that was prepared at that time or after that time, yes.

Q. By whom was this prepared?

A. It was prepared by Mr. Sumter, submitted to



(Testimony of Rudell P. Hill.)

the National Bank of Commerce who submitted it to Juneau through Mr. Sumter.

Q. Now, on the Defendant's Identification B there is a list of exhibits, were those submitted with the application?      A. They were. [279]

Q. Now, at the time that this application was submitted or prior to the time that it was submitted, had you had any discussions with Mr. Waxberg?      A. Yes.

Q. At what place were the discussions carried on, in Fairbanks?

A. No, I don't believe so.

Q. Well, were the discussions in Seattle?

A. I think so.

Q. Who prepared the legal description which is a list of exhibits?      A. Mr. Philleo.

Q. Who employed him?      A. I did.

Q. Do you know whether he was ever paid?

A. I paid him.

Q. Do you know who prepared the letter re ownership?

A. I believe Mr. Sumter prepared that.

Q. Who secured the letter re zoning?

A. I did from the city along with zoning maps from the city.

Q. There were photographs submitted. Do you know who secured them?

A. I furnished some from my files. They were photographs of my own property.

Q. Who secured the city map? [280]

A. I did through the City Clerk or the City

(Testimony of Rudell P. Hill.)

Manager, I have forgotten which now. It was from a city officer.

Q. Are you familiar with FH 21A Department of Labor form? A. Yes.

Q. Do you know who prepared that?

A. Mr. Sumter.

Q. Did you submit a personal financial statement? A. I did.

Q. Who prepared that?

A. Bohlet and Kohler.

Q. Are you familiar with Form FHA 2013E?

A. I am not from the number, no.

Q. Now, under the architectural exhibits, do you know who prepared the topographical survey?

A. Mr. Philleo.

Q. Do you know who prepared the preliminary papers, the architectural exhibits?

A. Chiarella and Kirk.

Q. Who employed them? A. I did.

Q. They prepared also outline specifications?

A. I believe the outline specifications was either in their office or Mr. Sumter's office, I not sure which office prepared those.

Q. And the trade payment break-down? [281]

A. That I don't know which, who prepared that.

Q. Now, you signed this application for mortgage insurance, didn't you? A. I did.

Q. As a sponsor on here we find the name of A. E. Waxberg Construction Company. You knew at the time you signed this that his name was on there? A. Yes.

(Testimony of Rudell P. Hill.)

Mr. Hepp: I object to leading questions.

The Court: Yes, counsel, I think you can ask the witness if he knows. Let him answer the question.

Q. (By Mr. McNabb): Do you know why Mr. Waxberg's name appears on the application?

A. Yes.

Q. Why did his name appear there?

A. In order to answer that question, if I am permitted to do so, I will have to go into some of the, you might say technicalities and figures and the methods of FHA as they were presented to me and I learned later that was so.

Q. What are they, Mr. Hill?

Mr. Hepp: Now, just a moment. I am unable to object to offers as they come out in a rambling conversation form or narrative form. I believe counsel should attempt by offers to give me, so that I am able to lodge an objection and to protect [282] the plaintiff in this cause.

The Court: I think I will permit the witness to answer the question why the name of Mr. Waxberg appears as a sponsor.

Mr. Hill: I have offered to review some of Mr. Waxberg's and Mr. Sumter's evidence at this time to explain my answer.

Mr. McNabb: The Court has ruled that you may answer the question.

Mr. Hill: Under the situation the FHA would insure for a certain amount. We had to show an equity of at least ten percent of that amount. There was a certain amount left for the contractor to con-

(Testimony of Rudell P. Hill.)

struct the building for his fees and construction costs or a lump sum contract. The contractor would receive a certain amount either way, it could be broken down into fees and remained into the building costs or it could all go together into the same amount as a lump sum contract. But, by his name being on there as co-sponsor and agreeing to leave forty-five thousand in there had the effect of building our equity with FHA. It left his contract price the same except that I would owe him forty-five thousand dollars that I had to produce later and pay him. It was really a forty-five thousand dollar advantage to Mr. Waxberg.

Q. (By Mr. McNabb): Is that the reason, Mr. Hill, that Mr. Waxberg is shown on here as other equity in the amount of forty-five thousand dollars?

A. Yes.

Q. And on the application I believe the forty-five thousand is labeled for a particular purpose?

A. I don't understand it.

Q. Well, it is explained here, is it not, on the exhibit?

A. For builders, no, it is forty-five thousand dollars of his builder's fee to be left there as his equity.

Q. And that was to increase your equity?

A. It would increase my equity. It would not effect his, the money that he received for doing the job, but it would cause the effect of I owed Mr. Waxberg forty-five thousand dollars to increase the equity in the building because later I would have

(Testimony of Rudell P. Hill.)

to pay Mr. Waxberg forty-five thousand dollars. In the meantime I would, I had the use of that forty-five thousand dollars to increase my equity.

Q. Now, the forty-five thousand dollars would not have been subtracted at all from Mr. Waxberg's fee for constructing the building? A. No.

Mr. Hepp: Now, I object to a leading question like that. I think the witness can state what that forty-five thousand dollars was.

The Court: Yes, I think that counsel is leading the witness excessively.

Mr. Hepp: I believe the witness answered the question. I ask that it be stricken. [284]

The Court: It will be stricken.

Q. (By Mr. McNabb): Would the contractor in a case of this kind, Mr. Hill, be paid the amount of his equity as represented on the application?

A. In this particular case he would. That doesn't signify that he would. It signifies that he would retain a forty-five thousand dollar interest in the building, or forty-five thousand dollars worth of stock in the corporation which was agreed between Mr. Waxberg and I that I was to purchase from him later.

Q. Was Mr. Waxberg interested at that time in an interest as such in a building?

A. No, he was interested in his fees for building and the profit of building.

Q. Was Mr. Waxberg aware at the time the application was filed of this, that is that his name was to appear as a co-sponsor?

(Testimony of Rudell P. Hill.)

A. That I do not know.

Q. Had you and he an agreement at that time as regards that forty-five thousand dollars?

A. That his equity would be bought by me later, yes.

Q. When was this application filed, Mr. Hill, if it was filed?

A. On or about February 4th, 1950.

Q. And where was it filed? A. In Juneau.

Q. Was the, was a commitment issued on the basis of this application? [285] A. It was.

Q. Did you have any discussions or any meetings with Mr. Waxberg between the date upon which the application was filed and the date upon which the commitment was issued?

A. I may have met Mr. Waxberg. It was, at that stage it was waiting period which nothing could be done until we were assured of that much. We couldn't invest any more money. We couldn't go ahead and do anything else until we waited and that commitment was processed and could be issued.

Q. Was there anything to be done at that time?

A. In connection with this, no, it was a waiting type of period.

Q. Did you have any funds other than the moneys which you were attempting to secure from the government with which to build a building?

A. No, I was borrowing and everything else to pay fees and pay architects for preliminary work

(Testimony of Rudell P. Hill.)

and carry it on to such stage as we could get government funds.

Q. Now, I will show you Defendant's Identification C and ask you if you know what that is, please?

A. That is the commitment for insurance.

Q. Now at this time, at the time that the commitment was issued to what extent had plans and specifications for a building been completed?

A. Just a very minimum of preliminary plans, what was [286] necessary to secure the commitment. We could not contract for an eighty or ninety thousand dollar architectural job to proceed any further and make ourselves liable for that money to pay those architects until we were assured of money to pay it.

Q. Mr. Hill, this is Defendant's Identification A. Do you know what this is?

A. Those are the preliminary plans as prepared by Chiarelli and Kirk to be offered as an exhibit at Juneau for the, with the application.

Q. And were they submitted?

A. Yes. I believe Mr. Sumter testified that one page was later delivered. There was one page short, that one delivered later.

Q. Mr. Hill, where was this building to be located?

A. The same location as I described for our idea of an office building under RFC between First and Second on Lacey Street.

(Testimony of Rudell P. Hill.)

Q. Now then, after the commitment was issued did you have any discussions with Mr. Waxberg?

A. I did, on two occasions.

Q. And where was the, do you know when the first of those meetings was held?

A. The exact date I am not sure of. The commitment as it stands in evidence was issued late in February. It was a few days after that when the commitment was in our hands we met [287] to consolidate all our former plans, get a contract price and really and seriously get down to work.

Q. Where did that meeting take place?

A. In the New Washington Hotel.

Q. Who was present there?

A. Mr. Waxberg, Mr. Orsini and myself and my wife.

Q. Do you know why Mr. Waxberg, or why Mr. Orsini was present?

A. Other than his interest in renting space he was there as Mr. Waxberg's adviser.

Q. At that time was he employed by you?

A. No.

Q. As regards the construction of this building or the plans had he ever been employed by you?

A. Not employed by me. He had been interested in the plans with sufficient space and the right space was provided for him that he was to advance rent on.

Q. Who arranged that meeting, Mr. Hill?

A. I don't recall. It was arranged after the



(Testimony of Rudell P. Hill.)

commitment for all of us to get together and get ready to go ahead on this thing.

Q. Now, what did you discuss at that meeting?

A. We discussed the amount of money made available under the commitment and what could be done with it.

Q. Mr. Hill, does the commitment for insurance, that is Defendant's Identification C, specify the amount of money that [288] the government was willing to insure? A. It does.

Q. And what is that amount?

A. One million six hundred ninety-four thousand two hundred dollars. I am putting that from memory. I haven't found it on the commitment. Oh, yes, it is on the front page and I have quoted it correctly.

Q. Now, Mr. Hill, was that amount of money available to the contractor for the construction of the building? A. It was not.

Q. How much money was available or what, let me ask you this, was there of necessity deductions to be made from that amount which would not have been available for the construction of the building?

A. There was.

Q. What are those deductions?

A. One were financing fees and such which the FHA retained. They never came into our hands.

Q. Is that amount of money indicated on any official form?

A. Yes, it is, it is indicated on, I am trying to think of the official word for the form. That is one

(Testimony of Rudell P. Hill.)

of their forms that are filled out by the FHA office. It is a project analysis.

Q. I will show you again, Mr. Hill, the Defendant's Identification B which is the application for insurance. There is, under carrying charges and financing a breakdown. What is that?

A. That is a list of the charges and which they retain. [289]

Q. Now, Mr. Hill, I will show you Plaintiff's Identification G, ask you if you know what that is?

A. That is the project analysis and I believe that I was in error on which paper these figures were. Well, they were on both papers.

Q. Does that, who prepares the project analysis?

A. It is signed by the FHA evaluator. I believe it is prepared in the FHA office.

Q. Does that indicate the amount of money that would of necessity be deducted from the commitment? A. Yes.

Q. What are those deductions, Mr. Hill?

A. Interest for eighteen months at four percent; real estate taxes; insurance; for fire, wind, storm and liability; FHA insurance premium; FHA examination fee; and a financing expense of one and a half percent, coming to a total of one hundred thirteen thousand two hundred sixty-four dollars.

Q. So then the figure of a million six hundred ninety-four thousand two hundred dollars would have been reduced in the amount of a hundred thirteen thousand, is that right? A. Yes.

Q. Were there any deductions?

(Testimony of Rudell P. Hill.)

A. Yes, the architect's fee.

Q. And what was the amount of that?

A. In, it would be in the amount of eighty thousand one hundred nineteen dollars. [290]

Q. Total of that is about two hundred thousand?

A. Approximately. I haven't figured it. I haven't had the notes on it.

Q. Now then, how much would then have been available to construct the building?

A. The commitment price less those which as my memory serves me, I haven't had the figures, would be in the neighborhood of a half a million, five hundred thousand.

Q. At any rate, that is a simple matter of mathematics, isn't it?

A. Yes.

Q. Did you discuss that matter with Mr. Waxberg in the New Washington Hotel?

A. I did.

Q. What was the extent of your conversation in that regard?

A. That that was all the money there was available for a contract was a million five hundred.

Q. What did he say in that regard?

A. That the commitment was for a million six hundred ninety-four thousand and he demanded that amount for the contract.

Q. Mr. Hill, could you possibly have given him that amount of money?

A. I know of no way in which I could have

(Testimony of Rudell P. Hill.)

raised the amount of money to give him that amount.

Q. It was not available from the loan, was it?

A. No. [291]

Q. Did you ever agree to give him that amount of money? A. No.

Q. What did Mr. Waxberg say then?

A. He said that he could not build and could not enter into a contract for anything less than the full commitment price.

Q. Did he make you at that time any counter-proposals?

A. I wouldn't call it a counter-proposal. There was more to his proposal.

Q. What did he say?

A. That if I would issue him fifty-one percent of the stock in the corporation, give Mr. Orsini the management contract then that he could sell stock and some of the remaining stock to raise this money.

Q. On that condition he would build the building?

A. On that condition he would build the building.

Q. Was that proposal acceptable to you, Mr. Hill?

A. No. May I enlarge on that?

Q. Why, why was it not?

A. We had, my wife and I our life savings, everything we owned invested in this, the very land that our present buildings are on was involved

(Testimony of Rudell P. Hill.)

in this. Everything that we had or could borrow was involved in the situation. They were offering us an undetermined amount of stock, whatever was left after they had sold off part of the forty-nine percent left to us to raise two hundred thousand dollars as our equity in the project.

Q. That would have left you virtually nothing?

A. Practically. Possibly nothing. Possibly a small equity in the buiding.

Q. Did you refuse that offer?

A. I told him that I could not if I wanted to, go that far because it would leave my wife and I with our life's work as of nothing.

Q. What did Mr. Waxberg say?

A. That he was standing pat, that was his last proposition.

Q. Did Mr. Waxberg also want Mr. Orsini to have a contract?

Mr. Hepp: I object to leading questions like that, suggests the answer to this witness.

Q. (By Mr. McNabb): Was a contract for Mr. Orsini a part of Mr. Waxberg's proposal to you?

Mr. Hepp: Same objection.

The Court: Sustained.

Q. (By Mr. McNabb): Well, now, Mr. Hill, in addition to his demand for the stock and the entire commitment price, did Mr. Waxberg insist on any other conditions? A. Yes.

Q. What was the other condition?

A. That Mr. Orsini get a management contract.

Q. Was that acceptable to you? A. No.

(Testimony of Rudell P. Hill.)

Q. On what note did the conversation terminate that day? [293]

A. Rather bitter.

Q. What was done to terminate the conversation?

A. Mr. Orsini went out and left us in a huff. We asked Mr. Waxberg when he was alone away from Mr. Orsini if he was standing on that, if he was going along with Mr. Orsini on such a demand. Yes, he was, that was the story, that must be the way it was. It had to be that way or nothing.

Q. Were you able to reach an agreement at all that day? A. No.

Q. Did you have any other conversation with Mr. Waxberg? A. Yes.

Q. When did they occur?

A. A few days later, I don't remember the exact date.

Q. Where did the conversation take place?

A. In the office of Mr. Kellog, an attorney with the firm of Bogle, Bogle and Gates in Seattle.

Q. By whom was he employed?

A. The attorney?

Q. Yes. A. By me.

Q. Who was present that week?

A. Mr. Waxberg, my wife and myself and Mr. Kellog.

Q. Do you know who called that meeting?

A. I did.

Q. Why did you do that? [294]

A. To try to iron out differences to get some

(Testimony of Rudell P. Hill.)

logical, some possible basis for a contract, to go ahead with our project which I had my money invested in.

Q. Did the conversation take place?

A. Yes.

Q. Who was there?

A. Mr. Orsini, Mr. Kellog, my wife and myself.

Q. Was Mr. Orsini there?           A. No.

Q. Well, who was present at that meeting?

A. I have listed the four that were present at that meeting.

Q. And who are they?

A. Mr. Waxberg, Mr. Kellog, my wife and myself.

Q. Now, what did you discuss there, Mr. Hill?

A. The finances and the possibility of building, the possibility of getting together on a contract on which we could go ahead.

Q. Did you discuss figures that day?

A. We did.

Q. Were there any notes made at that meeting?

A. There were.

Q. Who made notes?

A. I believe we all made notes.

Q. Now, I will show you the Defendant's Identification E and ask you what that is, please? [295]

A. Those are the notes, the figures that Mr. Waxberg was using at that meeting. Those are Mr. Waxberg's figures.

Q. Is that in Mr. Waxberg's hand?

(Testimony of Rudell P. Hill.)

A. Yes, the figures are, yes. The notations on there are not as we—(Interrupted)

Q. Were they made in your presence?

A. They were.

Q. And at the meeting that you are discussing?

A. They were.

Q. Now, Mr. Hill, will you explain those figures?

A. To the best of my ability these were figures—  
(Interrupted)

Mr. Hepp: Excuse me just a moment. Before we, before any evidence is allowed as to what that paper contains, I believe it should be in evidence before it is read to the jury and I am going to object because there are writings on that that are not in the handwriting of the defendant or the plaintiff. They are not his figures or his writing according to this witness. I object to it or any evidence given concerning it.

The Court: The Court sustains the objection.

Mr. McNabb: On what grounds, your Honor?

The Court: That if we are to permit this witness to testify as to what is in the exhibit there would be no object in offering the exhibit in evidence.

Mr. McNabb: I will move to admit it, your Honor. [296]

Mr. Hepp: I lodge my objection according to this witness there are writings there and symbols that are not a product of the plaintiff in this cause. He has nothing to do with it. He has testified that the figures are in the handwriting of this man but



(Testimony of Rudell P. Hill.)

that the other thoughts and figures are not his. I object to that.

The Court: I feel that the figures have been properly explained but I couldn't permit the exhibit to go in without further foundation or explanation as to the writing, so I will deny the offer at this time.

Q. (By Mr. McNabb): Mr. Hill, do you know what the writing on here is?

A. There are notes that Mr. Kellog put on there as we tried to identify or tried to get Mr. Waxberg's way of thinking into our head. Still trying to reach some basis of an understanding.

Q. You are familiar with the figures here to the extent of knowing what they represent, are you not?

A. Most of them I am. Some of them I don't know the meaning of.

Q. You were at the time familiar with them?

A. Yes, I believe I was. I think that I, now, that is again a question. I was not reading Mr. Waxberg's mind as he wrote those figures. I believe I know what they represent. I am familiar with most of the figures, yes.

Q. Now, there are on this Identification some writing which [297] perhaps may be in the nature of explanation. Are those notations erroneous?

Mr. Hepp: Now, I object to that. It is a leading question. He states that Mr. Kellog put those notations on. It is certainly not the best evidence of what they indicate or mean; whether or not they are erroneous has no bearing on this issue. I object

(Testimony of Rudell P. Hill.)

to any further questions on that other writing of this witness.

The Court: The objection is sustained as to the form of the question as calling for a conclusion of the witness.

Q. (By Mr. McNabb): Do you know, Mr. Hill, whether the labels as they appear there or the words as they are applied to the figures are correct or incorrect?

Mr. Hepp: Now, I object to that, your Honor, as calling for an opinion of this witness or a conclusion. They are not his writings. Counsel labels them as a label. I don't think that that is in evidence either. They are writings that are foreign to any of the parties here in Court. I object to it.

The Court: Objection is sustained.

Q. (By Mr. McNabb): When were those writings put there, Mr. Hill?

A. Immediately after Mr. Waxberg left Kellog's office.

Q. You are familiar, are you not, with the entire financial proceedings concerning this transaction up to the time that those [298] figures were written?

Mr. Hepp: Just a moment, sir. I object to the form of the question. It is very comprehensive. It is leading, the financial structure, the entire financial structure. He can ask this witness what he knows. I object to it. I believe the witness has answered the question. I ask that it be stricken.

The Court: I will permit the answer to stand.

Q. (By Mr. McNabb): Mr. Hill, as regards the

(Testimony of Rudell P. Hill.)

writing that has been added there, do they correctly identify the figures as you knew them at that time?

Mr. Hepp: Just a moment. I object to that offer, calls for a conclusion. This witness, they are not his writings. I don't think he is qualified to answer that question. I object. It is merely rephrasing of other questions.

The Court: Objection is sustained. May the Court see the exhibit, please. For the defendants' counsel I will state at this time with reference to Plaintiff, Defendant's Identification E, that the Court is satisfied that a sufficient foundation has been laid as to the figures appearing thereon, but the witness has testified that the writing was made thereon after the plaintiff who made the figures left the office. And I certainly don't want to have the writing erased but I cannot permit the identification to be received in evidence with the writing on it under the present state of the record. The writing would not be binding on [299] the plaintiff.

Mr. McNabb: Does the Court feel that we could not erase the writing there or remove the writing from the exhibit.

The Court: Under the situation which has developed the Court will permit counsel to inquire of the witness as to the figures appearing there on which he has identified as being in the plaintiff's handwriting. That is something I precluded before you made the offer.

Q. (By Mr. McNabb): Mr. Hill, do you know the amount of money, the maximum amount of

(Testimony of Rudell P. Hill.)

money that was allowable by the FHA per unit for the construction of an apartment building?

A. Yes.

Q. Did you know it at the time that you had your discussion with Mr. Waxberg in Mr. Kellog's office?

A. I did.

Q. Do you know it now? A. Yes.

Q. What is that amount?

A. That, do you want the total amount or the amount broken down into two parts, one per unit per apartment, plus—(Interrupted)

Q. There are two figures?

A. Plus a percentage allowance for commercial space. The full amount together would be eleven thousand eight hundred eighty dollars per unit including the allowance for commercial space. [300]

Q. Mr. Hill, how many units had you planned?

A. A hundred forty-four.

Q. On that basis are those the figures that are there, eleven thousand eight hundred eighty dollars?

A. It is eleven thousand eight hundred eighty dollars multiplied by a hundred forty-four giving a total of one thousand, or one million seven hundred ten thousand seven hundred twenty dollars.

Q. Was anything like that amount of money granted under the commitment?

A. Not that amount.

Q. Now, let me ask you this, Mr. Hill, did you at any time have any discussions with Mr. Waxberg concerning the retention by you of a part or any part of the commitment price?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. What was the nature of that discussion?

A. Twenty-five thousand and some odd dollars that must be deposited with FHA, the label they gave it was a working capital. I think the purpose of it was to insure that when the contractor finished the building that we were able to clean it up, put it in condition and rent it. That money as I understood it could be either retained by them out of a commitment money or we could deposit it in cash. I had no funds of my own left at that time to furnish it. We discussed various means of getting it and in talking this contract price at first I told him if I could save [301] that much out of the contract price I could borrow it and repay it later if I could show a lender where I could repay it. That was later dropped because of the excessive demands of the contract and I was willing to give him everything that I could possibly give him out of the commitment and not try to retain the twenty-five thousand dollars working capital.

Q. Did you ever discuss with Mr. Waxberg any sum of fifty thousand dollars?      A. No.

Q. Mr. Hill, were you willing that Mr. Waxberg should build this building?

A. Yes. I would have preferred a local builder on the building.

Q. Why did he not build it?

A. Because I could not pay the price he asked to build it.

Q. What price did he ask to build it?

(Testimony of Rudell P. Hill.)

A. One million six hundred ninety-four thousand plus some conditions, plus control of it.

Q. How much was available to construct the building?

A. In the neighborhood of a million five hundred thousand.

Mr. McNabb: May we have the recess at this time.

The Court: Very well. Members of the jury, I ask that you heed the previous admonition given to you. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes. [302]

(Thereupon, at 11:00 a.m., the Court took a recess until 11:10 a.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court is now in session.

The Court: Parties wish to stipulate that the twelve members in the box are the jurors duly impaneled and sworn to try this cause?

Mr. Hepp: We will so stipulate.

Mr. McNabb: The defense will stipulate.

The Court: Proceed.

### RUDELL P. HILL

the witness on the stand at the time the recess was taken, resumed the stand for further direct examination.

Q. (By Mr. McNabb): Mr. Hill, did you ever request Mr. Waxberg to come to Seattle to meet you?      A. No.

(Testimony of Rudell P. Hill.)

Q. Do you know why he went there?

A. He had informed me that he would be very interested in working with the architect to keep costs down. I notified him that preliminary plans were being made, that it was time he was there if he wished to be with the architect.

Q. Do you know whether the property upon which this building was to be constructed was ever drilled?      A. Yes.

Q. Did you employ anyone to drill that ground?

A. I did. [303]

Q. Who did you employ?      A. Mike Erceg.

Q. Do you recall how much it cost to have the ground drilled?

A. About twenty-five hundred dollars.

Q. Did you pay Mr. Erceg?      A. I did.

Q. Do you have evidence of your payment of Mr. Erceg?

A. I have evidence of part of it.

Clerk of Court: Defendant's Identification H.

(Cancelled check made payable to Mike Erceg in the amount of \$634.00 was marked Defendant's Identification H.)

Q. (By Mr. McNabb): Why did you have the ground drilled, Mr. Hill?

A. To supply architect with information for the footings on a building that was later planned and built.

Q. When was such information required by the architect?

(Testimony of Rudell P. Hill.)

A. When the structural engineer went to work for final plans.

Q. Was it necessary prior to that time?

A. No.

Q. Was it necessary prior to the time that Mr. Waxberg was no longer associated with you in this building?

A. No.

Q. I will show you Defendant's Identification H, ask you [304] if you know what that is, please?

A. That is a check on the Second and Lacey Street Apartments made payable to Mike Erceg for Six hundred thirty-four dollars.

Q. Why was that—(Interrupted)

A. It has been cancelled.

Q. Why was that amount paid to Mr. Erceg?

A. For drilling the property.

Clerk of Court: Defendant's Identification I.

(Cancelled check made payable to Mike Erceg in the amount of \$633.75 was marked Defendant's Identification I.)

Q. (By Mr. McNabb): And Identification I, what is that?

A. That is a check the same in all respects except a different date, in the amount of six hundred seventy-three dollars, seventy-five cents.

Q. Does that represent the entirety of the payment you made to Mr. Erceg?

A. It does not.

Q. Do you know how the balance was paid?

A. With my personal checks.

Q. Are they available at this time?



(Testimony of Rudell P. Hill.)

A. They are stored in past records. I haven't been able to dig them out.

Q. Did you employ anyone else to drill any of that property? [305]

A. I did not.

Q. Did you ever see any drill logs of the property other than those prepared by Mike Erceg?

A. I did not.

Q. Did you request the employment of a driller by any person? A. I did not.

Q. Or of any person, rather. Did you ever employ Mr. Orsini in this transaction?

A. I did not.

Q. You say Mr. Orsini was interested in some rental property? A. He was.

Q. Did Mr. Orsini assist in the financing of this project? A. Yes.

Q. To what extent?

A. Five thousand dollars.

Q. What was that to represent?

A. A part payment on advanced rentals that he had agreed to give me.

Q. What advance rental was this?

A. He agreed to give me advance rentals at the rate of ten thousand dollars a year for five years which would amount to fifty thousand dollars.

Q. Was that money ever paid to you?

A. Five thousand dollars. [306]

Q. That was all that was paid to you?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. Was Mr. Waxberg present at the time that this fifty thousand dollars was discussed?

A. I believe so, but I don't know.

Q. Did you ever have a discussion with Mr. Waxberg as regards fifty thousand dollars other than this fifty that you are discussing now?

A. No.

Q. Did you request Mr. Waxberg to go to Juneau with you?

A. I don't remember. We went as a group when the application was presented.

Q. Do you know where Mr. Waxberg went from Juneau?

A. I, yes, he came back to Fairbanks.

Q. Mr. Hill, do you know approximately the approximate amount of money under the commitment as it was issued that would have been actually available to a builder with which to construct that building?

Mr. Hepp: Now, I object to that as repetitious. I am sure he has asked that question three times.

The Court: Sustained. Sustained.

Mr. McNabb: You may cross examine.

#### Cross Examination

Q. (By Mr. Hepp): Mr. Hill, did you, was there a corporation formed at [307] the outset of this venture of yours in this building project which you have been testifying to?

A. There was a corporation formed during, dur-

(Testimony of Rudell P. Hill.)

ing the progress. Right now I couldn't tell you exactly what date that corporation was formed.

Q. Who were the original incorporators?

A. I believe that, my wife, myself, and Orlo Kellog, an attorney.

Q. Was Mr. Waxberg part of the original corporate charter? A. No.

Q. Know what appear in it?

A. No, that I know of, that I remember.

Q. Your first conversations then with Mr. Waxberg were in December sometime I believe you said, the early part of December? A. Yes.

Q. One or two conversations, three, how many?

A. I am indefinite on that as Mr. Waxberg was. I don't remember but there were conversations.

Q. Then I believe you testified that you had another conversation or two in January sometime?

A. Possibly before I left for outside, yes.

Q. And another conversation after the commitment was issued? A. Yes.

Q. Five or six conversations?

A. Yes in toto. [308]

Q. I believe you testified that it was quite probable though you didn't recall any conversation with Mr. Waxberg about the apartment building as distinguished from the original commercial building that you talked about was planned, is that right? I believe in response to counsel's question did you not testify that your first building was in the nature of a commercial building to be financed by RFC?

A. Yes.

(Testimony of Rudell P. Hill.)

Q. That you had discussed that matter with Mr. Waxberg together with Mr. Orsini and there was some conversation about a bank that Orsini wanted to put into the corner? A. Yes.

Q. Well, I believe shortly after that you talked about a, when you learned that you couldn't get RFC or it wasn't feasible that you then planned an apartment building? A. Yes.

Q. I have in my notes that you answered in response to counsel's question that you do not recall having discussed the apartment building with Mr. Waxberg although it may have been probable that you did?

A. That answer is correct. Your notes are correct.

Q. That answer is correct? A. Umm-umm.

Q. When was the conversation that you and Mr. Waxberg, according to you, that he agreed that he leave forty-five thousand [309] dollars of his builder's fees in the building?

A. I could not at this time give you the date or time of it.

Q. Possibly it would have had to have been in January some time, early part of February?

A. It could not have been in January. Yes, I was thinking of December. It could not have been in December because I wasn't here and we hadn't contemplated an apartment building.

Q. It would have been in January then?

A. It must have been some time in January.

(Testimony of Rudell P. Hill.)

Q. It was before the application was made for a commitment?

A. I believe it must have been.

Q. Well, if this forty-five thousand dollars qualified your financial condition to an acceptable point to FHA then it would have had to have been in the application, is that not right?

A. That is true.

Q. So you must have necessarily discussed it with Mr. Waxberg at some time prior to the application date?

A. Yes.

Q. But the best statement you can make in that regard is that it is just quite probable that you did discuss it. You don't recall that conversation? I don't understand.

A. Five years later, over five years later, I admit that there was possibly a conversation. There must have been a conversation but I do not remember the definite date of that conversation. [310]

Q. Well, I am not asking you for a definite date. I am asking you whether you in fact recall a conversation?

A. No, I do not.

Q. But you can even recall figures that were given at just a slightly later date in a meeting in your attorney's office down there, Mr. Campbell or whatever you say his name was; did you meet in an attorney's office later on?

A. Yes.

Q. Kellog, excuse me.

A. Kellog, yes.

Q. You can remember figures of that meeting though?

A. Because I have dealt with those figures ever

(Testimony of Rudell P. Hill.)

since. I have dealt with the same figures ever since. I am still dealing with them.

Q. Well now, what figures other than the commitment price and the building costs would you have been dealing with in connection with any figures that might have been discussed with Mr. Waxberg and what he you say was demanding of you? Why would you deal with those figures again?

A. Because later we built an apartment under the same set-up, the same number of apartments. We went through the same figures time and time again.

Q. Including the amount Mr. Waxberg had asked? A. The commitment price.

Q. As a builder's fee?

A. The commitment price was the same. [311]

Q. You have testified to other figures?

A. The commitment price would make the other figures exactly the same also.

Q. Mr. Hill, were you present when Mr. Sumter was testifying? A. I was.

Q. Did you hear him make the statement that it would take about a week to ten days to process an application?

A. I don't believe I did. I heard him make a statement it would take a week to ten days to prepare an application, not process it for a commitment.

Q. Did you hear him state that it would have taken you about five minutes to compile the in-

(Testimony of Rudell P. Hill.)

formation that he needed to make an application?

A. Well, it would have taken me about five minutes to give it to him after I had it, yes.

Q. As of the time when the application was submitted, Mr. Hill, just how much money had you invested in this project? You have testified that all your life savings had been in there.

Mr. McNabb: I object to that as having not been testified to.

Mr. Hepp: Your Honor, I distinctly recall him having said that he had no money with which to supplement the commitment figures.

Mr. McNabb: That is entirely correct, and we will admit that. [312]

The Court: Very well, the Court doesn't remember all the testimony. You may proceed.

Q. (By Mr. Hepp): As of the date of the commitment, Mr. Hill, how much money had you invested in this project?

A. Well, I can start to itemize. I possibly will even forget some of those.

Q. Well, would you give us a round figure?

A. A round figure, including purchase of land for the project?

Q. If you purchased it then, did you purchase any land?

A. I purchased options and taken my options upon payments, yes.

Q. Were those options expensive?

A. Yes.

Q. How much did you pay for the option?

(Testimony of Rudell P. Hill.)

A. There were several thousand dollars involved. I don't remember the exact amount now. I could get them from my records.

Q. How much as of the time of the commitment had you paid Mr. Sumter?

A. Mr. Sumter's fees were due only on condition that he get the commitment.

Q. Well, what I am trying to get at, Mr. Hill, maybe I am a little clumsy in my questioning, you are speaking, you have testified that there would be something in round figures of two hundred thousand dollars less the commitment that would be [313] available as a builder's costs and fees together? A. Yes.

Q. Now, would that include the architect?

A. Yes, if the project went ahead. As it was I was out twenty-five hundred to the architect at that time that could be reimbursed.

Q. Let's project this to a point where if that building had gone ahead as according to your original plan in that regard, I think that you stated that Mr. Waxberg had asked you for, I think you said he demanded fifty-one percent of the stock?

A. Yes.

Q. Approximately, does the FHA allow up to six percent as a builder's fee as Mr. Sumter testified?

A. It is on one of these forms. I could check it. I am under the impression that it is five. It possibly is six. There is a builder's fee and an architect's fee set out on one of those forms.



(Testimony of Rudell P. Hill.)

Q. It would be something in the neighborhood of a hundred thousand dollars?

A. In the neighborhood of ninety thousand dollars.

Q. It would be ninety at your figure of five, a little over a hundred at your figure of six, if he did say that?      A. Yes.

Q. Now, what would you have put in that building to equal fifty-one percent if Mr. Waxberg had left his builder's fee in that, forty-five thousand of which—(Interrupted) [314]

Mr. McNabb: Just a minute. I am going to object to that question, has no bearing on the issues of this case whatever.

The Court: I think it has only because it was gone into on direct examination. There is some question whether any of this evidence is admissible but it having been gone into on direct I am going to permit the cross examination.

Mr. Hill: That I wouldn't know because it was no speculation of Mr. Waxberg leaving anything in except forty-five thousand dollars of his builder's fee. That was to be repaid to him later. He was to hold stock for it until such time as I could buy it from him. He had repeatedly said that he had no interest in the building, only in the building contract and if he left money in there I was to repay him at a later date.

Q. (By Mr. Hepp): How do you reconcile that statement with your testimony here that he demanded fifty-one percent of the whole deal and he,

(Testimony of Rudell P. Hill.)

and then you say he repeatedly stated he didn't want any part of it?

A. Prior to that, and when the break-up came he made a demand it was impossible for me to meet.

Q. Had you talked to Mr. Slater as of that time, Mr. Hill?      A. Oh, several times.

Q. Concerning this very—(Interrupted)

A. He had asked to be cut in, asked to be allowed to become a contractor. Mr. Slater's reputation of a builder was such that [315] I could not consider him at any time.

Q. Well, now, isn't it a fact, Mr. Hill, that you told Mr. Waxberg that another contractor had offered to cut back fifty thousand dollars?

A. I didn't I believe, yes, that Mr. Slater did offer me anything within reason to give him the consideration. He got no consideration until such time that Mr. Waxberg had definitely withdrawn. If I told him that I told him as a joke because of conditions Mr. Slater was in why and how badly he wanted a contract.

Q. Do you joke about fifty thousand dollar kick-backs, Mr. Hill?

A. Yes, under those conditions it was so far-fetched to me that I joked about it.

Q. Your position is that instead of you demanding fifty thousand dollars he demanded fifty-one percent of the stock?

A. Plus two hundred thousand dollars more than it was possible to pay him.

Q. Well, that leaves me at a further problem?

(Testimony of Rudell P. Hill.)

A. His own evidence will show that he demanded two hundred thousand dollars more than there was to pay him, his own figures.

Q. Mr. Hill, there has been great length at this trial to show that there couldn't possibly have been a builder's fee because there wasn't any specifications as to the building, that no final form, nobody could possibly give a figure of a building, [316] how much it would cost to construct it unless they had some kind of a plans or general concept of the building and now you say that he wanted all of the money to make this particular building, to build this particular building. I can't reconcile those. Could you explain that to me, please?

A. If you will explain your question a little more definitely, I can.

Q. Well, the position has been in the defense of this case that Mr. Waxberg could and you could not possibly have had an agreement because there was no specific building upon which there could be an agreement made and there was no fixed amount of money so consequently there couldn't be any contract at all and yet right at that same time you testified that Mr. Waxberg demanded every cent of the money for the building to build the building?

A. No, I have not testified to that.

Q. Well, what did he demand when you stated that he said he wanted all of the money, the one million six hundred ninety-four thousand, well, the figure you have testified as to the commitment, you said that Mr. Waxberg claimed that he needed all

(Testimony of Rudell P. Hill.)

of that money to build the building you wanted built?

A. I think the evidence covers that. The commitment was issued for that amount. When Mr. Waxberg learned what the commitment was issued for he took that full amount of it and demanded it for the contract irregardless of what the FHA withheld and what had to go to the architect. [317]

Q. Isn't there a matter of ten percent some place that the owner has to put in over and above, doesn't FHA just go ninety percent? A. Yes.

Q. Who was going to supply that ten percent?

A. I was putting in my property which is on the city tax rolls for very near that amount. We were forty-five thousand dollars short as our paper work for the FHA I could use this forty-five thousand dollars of the possible builder's fee and repay Mr. Waxberg later for it.

Q. He didn't want any part of the building but he wanted fifty-one percent of the building?

A. Later, yes, when he and Mr. Orsini thought they had me cornered with my back to the wall, they demanded fifty-one percent and the management contract.

Q. Now, wasn't it just the reverse, Mr. Hill. After you had the commitment you didn't need Mr. Waxberg and Mr. Orsini anymore?

A. Oh, no.

Q. You don't even know whether you, although it is quite probable you may have had a conversation with Mr. Waxberg, but yet his name appears as

(Testimony of Rudell P. Hill.)

a sponsor right on through, do those things just happen like that, Mr. Hill?

A. Sometimes I believe they do. In this particular case we were in the hands of Mr. Sumter and the National Bank of [318] Commerce. We were accepting their figures and their way of preparing an application. They assured us that that is all it meant, that it was forty-five thousand dollars that I would later have to repay Mr. Waxberg. Those things happen in that manner when we are in the hands of experts that understand what they are doing.

Q. Actually, when you started this project you didn't know very much about buildings, or how to build them or how to finance them or anything about it?

A. I knew considerable about buildings and how to build them. I have been in construction work from the time I can remember, although I have never been a contractor, but I did not know anything about financing. In fact, I was amazed now at how little I did know at that time about financing.

Q. It has been quite an experience, hasn't it?

A. If I can remember all I have learned of this, I will do well.

Q. I believe you stated that Mr., that you did not request Mr. Hill to talk with your architects?

Mr. McNabb: What is this now, try that again.

The Court: Well, counsel merely said Hill. He intended Waxberg, isn't that right?

Mr. Hepp: I will start all over.

(Testimony of Rudell P. Hill.)

Q. (By Mr. Hepp): I believe you stated that you did not request Mr. [319] Waxberg to go to Seattle and specifically to go to the architects, but that he, Waxberg, wanted to work with the architects, is that essentially correct?

A. Yes. Now, I don't know how my, at this time I don't remember how my notifying him was worded. It might have been come to Seattle at once, something that way, when I notified him to come to Seattle to work with the architects. It was for his protection so that he could keep building within bounds to where it was profitable for him to build.

Q. Would that be pursuant to an agreement that he had with you to build the building?

A. It was a contemplated agreement but he had to have that privilege before he could make an agreement to build a building.

Q. A kind of an agreement to make an agreement?

A. Yes, negotiations for an agreement, you might say.

Q. When did you discharge Chiarelli and Kirk as architects?

A. When this project could not go ahead, when Mr. Waxberg and Mr. Orsini, Mr. Orsini was withdrawing his financial support. Mr. Waxberg was not a bit interested in the building contract. There was nothing more for Chiarelli and Kirk to do. I could not pay for them for drawing ninety thousand dollars for maybe complete plans I could not use. Naturally I discharged Chiarelli and Kirk.

(Testimony of Rudell P. Hill.)

Q. Who drew the plans that you ultimately did build? [320]

A. Is that question material, relevant to this case, who drew the plans for another building?

Q. I was wondering if you needed plans drawn to build a building?

A. Yes. Mr. Peck drew plans. If you want to know why—(Interrupted)

Q. Well, you said you didn't need any plans from Chiarelli and Kirk. I wondered if you needed any plans from anybody?

A. I did but another contractor that was going ahead with the project had an architect that he wanted to prepare the plans for him.

Q. Who hired Chiarelli and Kirk in the first instance? A. I did.

Q. Mr. Waxberg didn't?

A. As I remember it, no, Mr. Waxberg had not been in Seattle at the time I hired Chiarelli and Kirk. He had probably been in Seattle but not in connection with this case.

Q. You saw fit to hire an architect to assist Mr. Waxberg in the building, but you allowed your next contractor to select his own architect?

A. No, the next contractor and I consulted on the architect. He wanted the same proposition Mr. Waxberg had that he could work with the contractor, with the architect and keep the plans within reason.

Q. Actually all the people that worked with you in the [321] beginning of this building fell by the

(Testimony of Rudell P. Hill.)

wayside shortly after the commitment was made, is that right?      A. Definitely.

Q. Did you answer my question, Mr. Hill, what these, how much of these life savings, how much that amounted to as of the time when the commitment was issued, how much you had spent?

A. I think I answered that in that way, that my life savings was tied up in the property, what I had accumulated in this world was tied up in property that was to go in. A part of it I owned free and clear. It was business property where I was conducting a business, and I had contracted to pay for the rest of this property and I had to pay for the rest of this property which was a considerable sum of money, plus my expenses. Some FHA fees, some architects fees that I had to advance and one thing and another why it was considerable.

Q. Well, those are fees that I believe that you talk about that were contained in that two hundred thousand dollars?      A. Yes.

Q. FHA fees?

A. Yes. The property was the important part of it. I had contracted to purchase what I had not direct ownership at that time. I had no cash, but I had carried the load until that time, yes. Until the commitment was obtained and was responsible for any fees incurred if the commitment was not issued.

Q. Mr. Hill, has it always been your intention, your attitude that Mr. Waxberg should not be paid for any of the [322] services that he rendered to you?



(Testimony of Rudell P. Hill.)

A. Have we established—(Interrupted)

Mr. McNabb: Just a minute, just a minute. I am going to object to that on the grounds it is improper cross examination.

Mr. Hepp: He has set it up in his pleadings, your Honor.

The Court: Overruled. He may answer.

Mr. Hill: Have we established that Mr. Waxberg furnished me any services.

Q. (By Mr. Hepp): Did he?

A. None that I know of.

Q. This whole thing just happened, his name on the commitment, everything agreed with him to leave forty-five thousand of his builder's fee in there, all that no assistance at all?

A. Mr. Waxberg was making every effort to secure a contract to build a building. He has told you in his evidence that he expected to be repaid from any money or any services that he put out from the contract of the building.

Q. Well, now, if you are the one that calls off the contract?

A. Did I call off the contract?

Q. Did you? A. No.

Q. You didn't? A. No. [323]

Q. You didn't?

A. No. I could not meet his demands. He would not accept what I had to offer and what we had planned that we would have to offer. That he would not take. He wanted more than I could give him, two hundred thousand dollars more.

(Testimony of Rudell P. Hill.)

Q. More than was in the original agreement?

A. There was no original agreement. When we had come to know what money we had to build with he wanted two hundred thousand dollars more than it was possible in it so, and he refused to accept a contract for what was available to give him. I later contacted him and tried to talk sense with him. That is all the money there is, can you go ahead and build it for that? He says, no, I cannot.

Q. You had at that time determined what kind of a building you were going to build. I don't know how you can agree on a figure or whether somebody can build a building or they can't build a building if there are no plans or specifications or nothing to go by?

A. That is why I maintained that I was being put to the wall for demanding more than there was for any type of building we would draw plans for. He demanded the full commitment price before he would go ahead as his contract price to help design a building. I showed him how much money I had. He said, that is not enough. The commitment says for so much. He says I want that. [324]

Q. That is what he said? A. Yes.

Q. Down there in the New Washington Hotel?

A. Yes. Regardless of the design of the building he wanted the full commitment price without any deductions for financing fees or the FHA or architects fee so the building was not finally designed.

Q. Well, now, if a mortgage company will loan a million and a half dollars on a building, does that

(Testimony of Rudell P. Hill.)

contemplate a million dollars and a half worth of building or does it contemplate a million and a quarter dollars worth of building and the rest in financing fees and all those things; are those part of the value of a building that is mortgaged?

A. Just a minute, please, on that. The lender was lending ninety percent of the value of the building. I was furnishing ten percent equity. Part of the cost of that building is architects' fees and financing fees, not construction costs or contractor's fees. When you design a building part of your cost of your building is architects' fees. It is probable if you have, unless you have an enormous amount of cash part of it is in financing fees.

Q. How much is forty-five thousand dollars worth of operating capital worth, Mr. Hill?

Mr. McNabb: Just a minute. That is not material to the issues here involved. There is no testimony that there was [325] any forty-five thousand dollars worth of working capital. Improper cross examination.

The Court: Will the reporter, please, read the question.

(Thereupon, the reporter read the question.)

The Court: Objection sustained.

Q. (By Mr. Hepp): Did you and Chiarelli and Kirk part good friends?

Mr. McNabb: I object to that as having no bearing on the issues of this case.

The Court: He may answer.

Mr. Hill: No.

(Testimony of Rudell P. Hill.)

Q. (By Mr. Hepp): A little bitterness there, too?

A. Yes, they wanted the price for the full final plans not for what they had done. They wanted the rest of their fee for finishing final plans.

Q. Well, we must necessarily deduce, Mr. Hill, then that everybody has tried to take advantage of you or you have tried to take advantage of everybody else in this circle?

A. When there are disagreements not necessarily so.

Q. Well, evidently the people we work with—  
(Interrupted)

A. Are we interested in deductions?

Q. Evidently the people that you have worked with one way or the other either made excessive demands on you or you made excessive demands on them? [326]

A. On the other hand I have quite a number of friends. I have employees that have worked for me as high as thirteen years still with me, very good friends of mine that I would do considerable for. That is along the same line of your question.

Q. Just like probably Jack the Ripper had a few friends, too?

A. If you want to compare me with Jack the Ripper, yes.

Q. Well, merely in theory?

A. In theory all right.

Q. Everybody has friends, sir, that is not a test.

A. Umm-hmm.

Mr. McNabb: I object. We are getting pretty far afield.

(Testimony of Rudell P. Hill.)

The Court: Yes, we are getting pretty far afield.

Mr. Hepp: May I have just a moment, your Honor?

The Court: Certainly.

Q. (By Mr. Hepp): Mr. Hill, do you recall when you dismissed Chiarelli and Kirk in this whole venture, was that, in relation to the commitment?

Mr. McNabb: Just a minute. I am going to object to the question on the grounds it is not proper cross examination; that when Chiarelli and Kirk were dismissed, if they were dismissed, has no bearing on the issues of this case.

The Court: Overruled. He may answer. I think he has already testified he dismissed them.

Mr. Hill: It was, the exact date I don't know. It was [327] some months after our last conversation with Mr. Waxberg when we had given up being able to go ahead. They wanted the money for work on final plans which I could not go ahead with, guarantee them money to produce these final plans. They were pressing me for money and I told them they just as well quit and call it off. I had no further use for their plans; that I couldn't pay them for any further work regardless of how they felt, what they felt they were entitled to.

Q. Isn't their fee fixed in the commitment or the project analysis?

A. Oh, yes, but if we couldn't use their plans that fee did not come. If they had any money coming, if we did not use that plans, use that money to build that building where was the money to come from for them to pay them. Out of my pocket.

(Testimony of Rudell P. Hill.)

Q. When did you decide to build a different kind of a building then than this building you got the commitment on?

A. A year later. We had renewed our commitment and kept it in good standing on the possibility that we might be able to save something of the disaster but as far as going ahead and preparing plans, no, we could not do it until we had some assurance we could go ahead.

Q. You had a commitment I believe February the 24th, is that right? A. Yes.

Q. 1950? A. Yes. [328]

Q. Now, when did you decide to build a different kind of a building than the plans, the preliminary plans here show, when after the commitment date?

A. I would have to check records to find out when.

Q. I mean, was it early that spring, in the summer, the fall or the next year?

A. It was the next year.

Q. When did you decide not to build this building the preliminary plans of which I believe are an identification here?

A. Oh, it was some months later. The exact date I don't know. It was some months later.

Q. After you had discharged Chiarelli and Kirk?

A. Yes, after I had discharged Chiarelli and Kirk. Because I told them I didn't really discharge

(Testimony of Rudell P. Hill.)

them. I told them to do no further work until I had some assurance that I could pay them.

Q. Pay them for what they had done or the full —(Interrupted)

A. For the rest of it, yes. This work was completed. They weren't discharged from this work. It was completed. But it was discharging them from doing any more work for me until such time as I could pay them for it, could use their work.

Q. This drill log that you spoke of that Mike Erceg, that came along a lot later, didn't it?

A. Yes, considerable later.

Q. That had nothing to do with getting an FHA commitment at the outset? [329]

A. No, it was for the structural engineer. Those drill cores were sent to a testing laboratory for analysis before a structural engineer could start to design the footings. And the footings were only designed on final plans, not on preliminary plans. They were not even used on the preliminary plans that we later submitted.

Q. Did you ever have occasion before the application was filed to ask Chiarelli and Kirk whether or not the building which they were making preliminary plans was a feasible one?

A. They asked me what I knew of the soil construction. I told them as far as I know it was sand and gravel. If that was the case then we seemed to be, until we needed further data, go ahead.

Q. Would it make any difference if there were permafrost down there?

(Testimony of Rudell P. Hill.)

A. That would make a difference to the contractor and not to the builder. If there was a contractor when he started to excavate and prepare for footings it would have made a difference to a contractor, yes.

Q. Well, now, what was under the Polaris Building, sand or gravel? A. Both.

Q. But what was there at the time when these preliminary plans were drawn was not important to Chiarelli and Kirk in designing these plans?

A. They designed no footings, no.

Q. They designed no footings?

A. They designed no footings or foundation at that time.

Q. As far as I can see then, these plans served absolutely no purpose except to get a commitment out of the FHA?

A. That is all they have ever served.

Q. Then they were abandoned?

A. That is all that preliminary plans were prepared for. That was the purpose they were intended for.

Mr. McNabb: May we have the noon recess now, your Honor.

The Court: Is that agreeable with the plaintiff's counsel? Members of the jury, once again I admonish you that it is your duty not to discuss the subject matter of this trial with anyone or among yourselves; not to express any opinion thereon until the case is finally submitted to you. And you are excused until two o'clock.



Clerk of Court: Court is recessed until one-thirty.

(Thereupon, at 12:00 noon, the trial of this cause was recessed until 2:00 p.m.)

### Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

Clerk of Court: Court has reconvened.

The Court: Parties wish to stipulate to the presence of the jury? [331]

Mr. McNealy: Yes, your Honor.

Mr. McNabb: Yes, your Honor.

### RUDELL P. HILL

the witness on the stand at the time the recess was taken, resumed the stand.

Mr. Hepp: No further questions.

### Redirect Examination

Q. (By Mr. McNabb): Mr. Hill, for what purpose did you employ the firm of Chiarelli and Kirk?

A. To prepare preliminary drawings, as requested, as needed for the FHA application.

Q. Did you employ them for the purpose of assisting Mr. Waxberg? A. No.

Q. So far as securing the commitment and the preparation of the application for the loan is concerned, did you need the assistance of Mr. Waxberg or Mr. Orsini?

A. I needed very badly the prepaid rent that

(Testimony of Rudell P. Hill.)

Mr. Orsini was to furnish to help me finance. I needed a builder, a contractor, preferably a local contractor to keep the money in town.

Q. How much prepaid rental was it that Mr. Orsini was supposed to give you?

A. Fifty thousand dollars. [332]

Q. For what purpose did you need that?

A. Help purchase property, pay fees, pay expenses in getting this project organized and in shape to go.

Q. Mr. Orsini aware of that?

A. He was.

Q. Mr. Hill, this equity that has been discussed, that is there to be a ten percent equity if I understand the situation correctly, is that right?

A. That's right.

Q. Now, was there any requirement as to what that equity was to be?

A. Other than the ten percent of what we applied for?

Q. That's right.

A. No, it could be in several forms. It could be in land. It could be in cash. It could be to show that I had invested that much money, that there was that much money invested to offset the government's guaranteed loan.

Q. And in this instance the bulk of the ten percent was in what?      A. In property.

Q. What sort of property?

A. You mean a legal description or part?

(Testimony of Rudell P. Hill.)

Q. No, was it personal property or real property?  
A. Real property.

Q. What do you mean by real property? [333]

A. Land.

Q. Were you occupying any portion of the land at the time you made this application?

A. Yes.

Q. For what purpose were you occupying it?

A. My business was then located in a building on that land. I had a bar, a liquor store, I had four business spaces rented under lease that I had to arrange for those leases to, I don't know, leases to be released back to me.

Q. In the event that you had *exceeded* to the demand for fifty-one, or interest of fifty-one percent in the corporation who then would have controlled all of your land?

A. The one that got the fifty-one percent, absolute control.

Q. Who would that have been?

A. Mr. Waxberg. The management contract would have left me with no income whatever or a chance of an income whatever from that time on. The only way that you can get money from an FHA controlled corporation under one of these set-ups is through a dividend and there was no dividend allowed until such time as the loan has been repaid.

Q. So then you would have realized no income from the entirety of your property under the, under the requested agreement with Mr. Waxberg?

(Testimony of Rudell P. Hill.)

A. None whatever for thirty years, or thirty-two, whatever the mortgage was to run. [334]

Mr. McNabb: I have no further questions.

### Recross Examination

Q. (By Mr. Hepp): Well, didn't you still own your bar and those other buildings which you were talking about?

A. They would have had to have been destroyed to complete the building as the plans were at that time. The building would have been on that property.

Q. Well, now, if you were to change plans with another contractor or if there had been no definite plans formulated how does that effect Mr. Waxberg, why would the situation be different?

A. Would you— (Interrupted)

Q. I will rephrase the question. Maybe that wasn't very fair. You build a building and still preserved these other properties that you have just mentioned, is that right? A. Yes.

Q. And they are not a part of the building?

A. They are not.

Q. Wasn't it possible for Mr. Waxberg to have built that building and still you retained these properties which you say would have been forever lost from you?

A. It was impractical because the building was of so much more value if it could have been extended through the street. The business location, if I had at that time restricted the building to its

(Testimony of Rudell P. Hill.)

present location I was losing at that time the financing of prepaid rent of Mr. Orsini. He was advancing, I was losing the location he needed at that time, that he wanted. [335] He was willing to pay prepaid rent on it.

Q. The building that you ultimately built though was equal or greater value than originally planned, is that right or not?

A. Costwise, yes, but not in value and commercial rental space.

Q. Was there some question about a title as against the Dales at that time that may have influenced your decision?

A. Later there was a question of title is what influenced our decision to build it on a smaller lot, but at that time as I remember, no question of title had arisen on that land.

Q. But as it ultimately developed there was a question?

A. There was later, yes, but that since has been resolved.

Q. You mean the difference between forty-nine percent and fifty-one percent is the difference between your not getting any income for thirty-two years and your getting income in thirty-two years?

A. The difference between controlling interest in a corporation, fifty-one percent of the stock is absolute control of the corporation because it votes by stock and fifty-one percent of the stock controls every action of that corporation plus the manage-

(Testimony of Rudell P. Hill.)

ment contract would have taken even a salary from me.

Q. You feel that the directorship of, being out of your control, everything would have been taken away from you?

A. I, there was no conceivable way that I could have received any benefits from the building until such time as the [336] corporation could declare a dividend or the sale of stock that was left to me after they had sold some of that remaining forty-nine percent to raise added capital.

Q. Did you know Mr. Mullen, Sr., of Mullen Contractors in Seattle?

A. I became acquainted with him about a year later.

Q. Has he since died?                      A. He has.

Q. Mr. Hill, during the year of 1950 or the early portion of 1951, did Mr. Mullen, Sr., give you fifty thousand dollars?

A. No. I still owe the S. S. Mullen Company considerable money that I am paying as we had intended to repay the stock, the builder's fee to Mr. Waxberg. I am still paying on that same thing with Mr. Mullens.

Q. Did you deposit the sum of fifty thousand dollars into a bank account which was later put up for the FHA?

A. Did I deposit?

Q. Or some agent of yours in your behalf?

A. I don't know that it was. I don't remember any such transaction.

(Testimony of Rudell P. Hill.)

Q. I didn't quite catch your answer.

A. I certainly remember no such thing, no.

Q. But you didn't need Mr. Waxberg's forty-five thousand when you ultimately built?

A. I think I have explained that in detail. If you want me [337] to go into detail again, I can.

Q. Did you pay Mr. Orsini back the five thousand dollars that he gave you?

A. Not to Mr. Orsini. It was not his money that he furnished. I paid the money to Dawson Cooper.

Mr. Hepp: I have no further questions.

#### Redirect Examination

Q. (By Mr. McNabb): Mr. Hill, this forty-five thousand dollars that is mentioned in the application, was that to have been advanced to you by, out of Mr. Waxberg's pocket?

A. No. It was a waiving of a fee that I would later reimburse him for.

Q. I believe, I hand you Defendant's Identification F. Did you ever see this instrument, Mr. Hill?

Mr. Hepp: Just a moment, Mr. Hill. Your Honor, I think ample opportunity has been given counsel to identify these identifications and I am going to ask that he either have them offered as exhibits before further testimony has been given on them. I know that much has been used of them, but our waiver up to this point is not a continuing waiver here on out.

Mr. McNabb: Waiver of what, Mr. Hepp?

(Testimony of Rudell P. Hill.)

Mr. Hepp: Waiver of having those things either offered as exhibits and testified from as exhibits. You can't testify from identifications merely identified. They are not in evidence [338] and I refuse to have them read from further until they are offered as exhibits and then they can be read from.

The Court: Gentlemen, I see no reason for not commenting at this time in the presence of the jury, but I have been somewhat surprised at the method of using Identifications in this Court. It has been the practice, it has happened in every case that I have sat in in this Court and I am going to state now that I think it is a very confusing way to try a lawsuit, but I am not directing this remark to any particular attorney. I want the jury to understand that. It is just that it has been the practice of doing court work here. It is my feeling that after there has been an exhibit identified and after the foundation is laid that is an ideal time to make the offer. Otherwise the Court, if it is delayed and waited around, we don't know what foundation has been laid for the offer and I believe it is a better practice that the exhibits be offered after they have been identified and then we will not have any problem at all relating if they are received in evidence relating to the use of the Identification or Exhibit, so with that in mind, counsel, I wish that you and other counsel would make seasonable offers after the Identification has been made.

Mr. McNabb: Now then, will the Court rule on the objection?



(Testimony of Rudell P. Hill.)

The Court: The Court will sustain the objection.

Mr. McNabb: On what grounds? [339]

The Court: On the grounds that through the entire trial reference has been made to exhibits, this particular exhibit the witness testified from, the exhibit or the Identification of the exhibit without the exhibit having been offered or received in evidence.

Mr. Hepp: For the purposes of that question I will withdraw my objection.

The Court: Very well.

Mr. Hepp: Just yes or no, please.

Mr. Hill: Yes.

Q. (By Mr. McNabb): When did you first see it, Mr. Hill?

A. Mr. Sumter showed it to me.

Q. Did you at any time ever ask or have any conversation with Mr. Waxberg as to his cash position?

A. He told me that he was able to— (Interrupted)

Mr. Hepp: Just a moment. Excuse me.

Mr. Hill: Yes, I did.

Q. (By Mr. McNabb): Did you ever have occasion to ask him if he had forty-five thousand dollars?

Mr. Hepp: Just yes or no, please.

Mr. Hill: No.

Q. (By Mr. McNabb): Did you ever ask him how much cash he had? [340]

Mr. Hepp: Just yes or no.

Mr. Hill: No.

Q. (By Mr. McNabb): Did he ever indicate to

(Testimony of Rudell P. Hill.)

you that he had forty-five thousand dollars?

Mr. Hepp: Now, I object to that unless counsel explains what he means, indicate to him. I don't think it is a fair question. It could bring a highly speculative answer.

The Court: Sustained.

Q. (By Mr. McNabb): Did Mr. Waxberg ever tell you how much cash he had? A. No.

Mr. McNabb: You want that answer stricken?

Mr. Hepp: Yes, I am going to object to it and ask that the answer be stricken and that counsel be asked to identify times and so forth so I will have an opportunity to object. I don't know when he is talking about, in the last five years, any time.

The Court: It may stand. Proceed, counsel.

Mr. McNabb: I have no further questions, your Honor.

Mr. Hepp: Neither do we.

(Witness excused.)

Mr. McNabb: The defense rests, your Honor.

The Court: The defense intend to offer into evidence any of the identifications before resting or are you resting advisedly, Mr. McNabb? [341]

Mr. McNabb: Well, of course, your Honor, we intend to offer the entirety of the Identifications in evidence.

Mr. Hepp: Well, I believe, your Honor, in that case it should have been done before they rested their cause.

Mr. McNabb: We have a perfect right to put on any sur-rebuttal.

The Court: Does the defense move to re-open for the purpose of offering Identifications A to G, inclusive.

Mr. McNabb: Yes, if we may, your Honor, and in addition the Plaintiff's Identification No. 3.

Mr. Hepp: I would like to go through these before I state whether we oppose any of the offers.

The Court: Yes and, gentlemen, perhaps there are some times when it is advisable to withhold the offer, but this illustrates exactly what I meant. We may have twenty or thirty Identifications and they are all accumulated and the offer made at the close makes it a very difficult proposition for the Court and for the attorney, for the jury. The Court will certainly give the plaintiff an opportunity to examine the Identifications. May I see Identification F, Mr. Clerk. Mr. Hall, will you give these to Mr. Hepp.

Mr. Hepp: We have no objection to Defendant's Identification G, A, D, B, C, I think unless, sir, that is an E, I don't know.

Clerk of Court: That is C. [342]

Mr. Hepp: C. We object to Identification E, has not been properly identified and pertinent there having been testimony that there are other writings on it. We object to F, the same being a financial statement which as I recall the testimony now was only that it was brought to an office. There has been no signature identified on it to my recollection. And we object to H and I as not being contained within the issues of this Court date-wise or otherwise. It refers to transactions occurring according to the

witnesses testimony, a year or more later, a year and a half later and nothing to do with the commitment, the application, any part of this matter in which Mr. Waxberg and Mr. Hill are in controversy here and in connection with any buildings which have been pertinently discussed here and particularly reflected by Identification A, being the preliminary plans.

And we are completely indifferent about Identification 3. He offered it. We certainly don't object to that. Those are our objections to the offer of the defendant.

The Court: May the Court examine Identification F? At this time the Court will receive into evidence Defendant's Identification A through I, inclusive, except for Defendant's Identification F. Strike that. Defendant's Identification E. And the Court will also admit into evidence Plaintiff's Identification No. 3.

Clerk of Court: Do I understand it is E and F that are excluded? [343]

Mr. Hepp: F is admitted. E is excluded.

The Court: F is admitted. E is excluded.

Clerk of Court: Identification A is Defendant's Exhibit 1; B, No. 2; C, 3; D, No. 4; F, No. 5; G, No. 6; H, No. 7; I, No. 8; and Plaintiff's Identification No. 3 is Defendant's No. 9.

(Defendant's Identifications A through D, inclusive, were received in evidence as Defendant's Exhibits 1 through 4, inclusive.)

(Defendant's Identifications F through I,

inclusive, were received in evidence as Defendant's Exhibits 5 through 8, inclusive.)

(Plaintiff's Identification No. 3 was received in evidence as Defendant's Exhibit No. 9.)

The Court: The defendants rest?

Mr. McNabb: We again rest, your Honor.

Mr. McNealy: Call Mr. Philleo.

### EDGAR PHILLEO

a witness called in behalf of the plaintiff in rebuttal, was duly sworn and testified as follows:

#### Direct Examination

Q. (By Mr. McNealy): Will you state your name, please? A. Edgar Philleo.

Q. And what is your business, Mr. Philleo.

A. I am a professional engineer. [344]

Q. Here in Fairbanks, Alaska?

A. Yes, sir.

Q. And that Philleo Engineering Service?

A. That's right.

Q. What is the correct name?

A. Philleo Engineering Service.

Q. And were you so engaged in business here in, during the month of January, 1950? A. I was.

Q. Are you acquainted with the plaintiff, Mr. Waxberg, and the defendant, Mr. Hill?

A. I am.

Mr. McNealy: I would like to have this marked for identification, one page.

Clerk of Court: Plaintiff's Identification No. 9.

(Testimony of Edgar Philleo.)

(Carbon copy of invoice of Philleo Engineering was marked Plaintiff's Identification No. 9)

Q. (By Mr. McNealy): Did you ever have occasion to make any survey of real property for either Mr. Hill or Mr. Waxberg?

A. Yes, several occasions for both. Both individually that is.

Q. Handing you Plaintiff's Identification 9, I will ask you if you have ever seen that page in that particular book before? A. I have. [345]

Q. And do you know whose handwriting that is?

A. It looks like my handwriting. I initialed it.

Q. Is that a record that you keep in the regular course of your business? A. It is.

Q. Those are your initials appearing thereon?

A. Yes, sir.

Q. Do you recall, yes or no, whether you ever surveyed any property belonging to Mr. Hill between First and Second Avenue on Lacey Street?

A. Yes.

Q. Is there any connection between that particular survey and the Identification 9?

A. Well, now you asked me if I recalled ever having made a survey for Mr. Hill in that block. I think I have surveyed it a couple different times but there is a connection between this bill and one of those surveys.

Q. What date appears upon that?

A. January 31st, 1950.

Mr. McNealy: If the Court please, I am going

(Testimony of Edgar Philleo.)

to offer this record as a record kept in the usual course of your business, is that true?

Mr. Philleo: It is.

Mr. McNabb: We have no objection.

The Court: It will be received. [346]

Clerk of Court: Plaintiff's Exhibit H.

(Plaintiff's Identification No. 9 was received in evidence as Plaintiff's Exhibit H.)

Q. (By Mr. McNealy): Do you recollect, Mr. Philleo, on this in regard to Plaintiff's Exhibit H?

A. Is this Exhibit H?

Q. Plaintiff's Exhibit H here whether or not, did Mr. Waxberg or Mr. Hill or both or do you remember who instructed you to do the work represented by that bill?

A. I don't recall exactly who instructed me, no.

Q. And do you recall who employed you or—  
(Interrupted)

A. No, frankly, I don't recall who it was.

Q. The bill has been paid, has it?

A. The bill has been paid, yes, sir.

Q. Do you recall who paid you?

A. No, not for certain.

Q. I wonder, would you read the writing, the figures on the bill to the jury, please?

A. Well, I can. Up at the top it says, Al Waxberg and R. P. Hill, services for month of January, 1950. It is dated by the way 1-31-50, and it is my invoice No. 00340. It is services for the month of January 1950. Survey. Office three twenty-six. Total

(Testimony of Edgar Philleo.)

five hundred seventy. Marked charge and my initials. [347]

Q. What does the office work, I will withdraw that. The survey stated here, is that the survey of the Hill property between First and Second Avenue on Lacey Street in Fairbanks?

A. As I recall it was a portion of that property. Possibly it was all. I can't tell from that particular record.

Q. Would you state what the office work represents, what that represented?

A. I don't recall exactly but ordinarily it is for plotting of maps, calculations of survey notes and so forth.

Q. Do you recall at this late date whether either Mr. Waxberg or Mr. Hill were present when the survey was being taken?

A. You mean present in the field?

Q. Yes.

A. I don't recall. I didn't make the survey myself. It was made under my direction by some of my men, but I wasn't in the field all the time. I probably stopped by there.

Q. And do you have any present recollection as to whom the plots or specifications, plats were delivered to?

A. I believe they were delivered to Mr. Waxberg but I am not positive of that.

Mr. McNealy: You may take the witness.

Mr. McNabb: We have no questions.

(Witness excused.)



Mr. McNealy: If the Court will excuse us just one moment. [348]

The Court: Certainly.

Mr. Hepp: We will rest.

Mr. McNabb: We rest, your Honor.

The Court: Members of the jury, both parties have rested which means that the evidence in the case has been concluded. It is about time for the three o'clock recess and perhaps the recess will be a little longer than usual, but I give you the usual admonishment not to discuss this case with anyone or among yourselves; and do not express any opinion until the case is finally submitted to you. You are excused for at least 10 minutes.

(Thereupon, the jury withdrew and the following proceedings were had out of the presence and hearing of the jury):

Mr. McNabb: The defense would like to be heard following the recess.

The Court: Following the recess. Yes, perhaps, all right. And the Court will recess for ten minutes.

Clerk of Court: Court will recess for ten minutes.

(Thereupon, at 2:55 p.m., the Court took a recess until 3:05 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: If the parties wish to waive the presence of the Clerk we may proceed without him.

Mr. McNealy: Very well.

Mr. McNabb: Your Honor, I now move the Court for a [349] directed verdict as regards the

third amended complaint. Pardon me, each of the several grounds that I have heretofore advanced and now additionally for the reason that we feel that the testimony of the defense which has not been controverted by the plaintiff by reason of the failure of the plaintiff even to deny the statements or the evidence which was introduced on behalf of the defense in this case causes that to stand true. In that event we feel that the defense has established that if there was a contract that ever existed between the parties or that if any labor was performed by the plaintiff in this action that if he received or failed to receive any value or any benefit from it, it was not due to the fault of the defendants but if that there was in fact a violation of any agreement that it was a breach and a violation by this plaintiff; that the money which the plaintiff sought for the construction of a building was not available and could not have been available and it was known to the plaintiff that it was not available; that the defendants in this action have stated that they were perfectly willing that the plaintiff construct the building if he could do it on the amount of money that was then available under the commitment. The plaintiff has not come back to rebut that testimony and that if there were any loss occasioned to the plaintiff by reason of any of the services which were performed or the money expended it was not due to any fault on the part of the defendants; that they stood ready and willing to proceed; and that testimony, your Honor, has not been [350] controverted, your Honor, and has not

been denied and at this time I think the testimony of Mr. Waxberg that he has some recollection of a discussion concerning fifty-one percent of the stock becomes exceedingly relevant, highly valuable testimony in regard to, taken in view of and in light of the testimony of the defendant, Mr. Hill and he says that such a demand was made upon him.

Of course it is, it is now and has always been our contention that the moneys were expended and the labor and the services were performed for the purpose of securing a contract; that there is not and never was a reliance on the existence of a contract. We feel that there is not now nor has there ever been any evidence sufficient to warrant allowing this case to go to the jury. We, therefore, move for a directed verdict as regards the third amended complaint.

The Court: Let me compliment counsel on a concise, well-stated argument. Mr. Hepp or Mr. McNealy.

Mr. McNealy: If it please the Court, we believe the original testimony of the plaintiff here was in, and that of the defendants was in direct controversy and in my opinion there is a, sufficient for the, before the Court here for the matter to go to the jury. It is not upon mere statements which the plaintiff remembered in the case but if, I would like a quotation taken from the text of the opinion of the courts, *Thurston vs. Nutter*, 47 A.L.R., 1161 where it says, but if the agreement instead of [351] being as contended by the plaintiff or by the defendants was not completed because there was not

a clear concession on both sides to one and the same set of terms or a complete mutuality of engagement so that each had the right at once to hold the other to a positive agreement then the plaintiff could maintain an action on quantum meruit because where one party renders services beneficial to another under circumstances that negative the idea that services were gratuitous and the party to whom the services are rendered knows it and admits it and accepts the benefit he is bound to pay a reasonable compensation therefor.

What applies so much in this action is the conclusion of that statement. I quote, "that is because such facts and circumstances justify a presumption that the party to whom services are rendered must have requested them and, therefore, the law applies." I believe further that the exhibits entered in here and the showing that Mr. Waxberg is the co-sponsor, his name appearing throughout the exhibits which made possible the securing of this FHA commitment which was later used as a revised commitment in the actual construction of the building and due to all of the controverted statements between the parties; Mr. Hill states there fifty-one percent, the difficulty that arose over this and Mr. Waxberg on the other hand testified I believe on both occasions on the stand it was a matter of a fifty thousand dollar kick-back that caused the Hills to, I believe, your Honor, that the, I certainly am willing to state to the Court that I would [352] like to have had the plaintiff more definite in regard to it but in view of the fact that he was not more defi-

nite, told only what he did remember, then we must go back, rely upon the presumption there that the defendants allowed him to go ahead on this and the Courts say we have the right to presume that he must have requested those things. I believe the testimony was that he at least the architects requested the drill log set out that it was necessary to have this survey made at the time it was made. It appears that both Mr. Waxberg and Mr. Hill were billed for the survey. And I believe there are sufficient facts, your Honor, to go before the jury and for them to decide whether or not there was any promise to pay or any implied contract whatsoever.

The Court: Gentlemen, before I rule on the motion which, of course, I am about to do I wonder if counsel can point out to the Court wherein in the pleadings or in the evidence or either there is any cause of action made out against the defendant, Mary Hill. Through the entire trial I have been wondering where the cause of action is made out against Mary Hill and maybe there is something in the pleadings that would cover that. I don't know.

Mr. McNealy: Your Honor, I believe that there has been no cause of action made out against Mary Hill as the defendant here; that possibly when I prepared these original pleadings about five years or so ago there may have been a reason for it, but we certainly have failed to show it in this case.

The Court: Well, with that statement and the concession on the part of plaintiff's counsel, the

Court at this time will dismiss the action in so far as the defendant, Mary Hill, is concerned.

And now, gentlemen, it is significant to me that Mr. McNabb argued that perhaps after the defendants testimony is in uncontradicted by the plaintiff that it appears that the plaintiff himself was at fault. I was pleased that counsel used that argument because that is one that has been running through my mind. If I am to submit this third amended cause of action to the jury it is my intention to instruct the jury that an agreement was made between the plaintiff and the defendant because it isn't denied. Both parties testified to that; that an attempt would be made to procure a commitment from the Federal Housing Administration to build a building and if a commitment were not obtained as the plaintiff says he was to forget his loss as there was no understanding what would be done in that case; but if the commitment were granted both parties concede and so testified that if the commitment were granted that Mr. Waxberg would build the building.

Mr. Hill said he was very desirous of having Mr. Waxberg do it, local contractor, he was the man he wanted even after the commitment was made he hadn't changed his mind. He still wanted Mr. Waxberg. And it was subsequent to the commitment that the trouble arose. I can't find as a matter of law that the fault was Mr. Waxberg's. I can't find as a matter of law that the fault [354] was Mr. Hill's but they did not get together on their subsequent

agreement. They seem to have had an agreement to later agree on something and when the later time came, they didn't. Now, I don't know who was at fault. I think that is for the jury to determine after I instruct them as to the understanding that is clear in the evidence and I think it is my duty to further instruct the jury that if the fault was Mr. Waxberg's, that is the reason that they didn't get together, that Mr. Waxberg cannot recover. If, however, the fault was Mr. Hill's, the jury should find then Mr. Waxberg may recover such sums as he reasonably is entitled to for services and expenses. Or if neither party was at fault but they failed to agree and the jury is unable to pin the ball on either side still we know the contract did not materialize and then in that event I believe the jury may find for the plaintiff in such sums as reasonable as set forth in my instructions, not exceeding, of course, certain amounts as adduced by the evidence.

Now, perhaps it has no part of this particular proceeding but it certainly is unsatisfactory, the evidence is unsatisfactory as to what the plaintiff actually did in and about these negotiations. I thought that a party that worked forty-three days, if he did, on a project of this nature, would have the exhibit desk piled high with estimates and with various documents to substantiate the amount of work that he did, but as Mr. Waxberg kept saying repeatedly on the stand, it is so long ago he doesn't [355] remember those things. Well, he can't expect the Court to supply for him his failure to remember.

Do the parties have any requested instructions for the Court?

Mr. McNabb: Your Honor, I have some.

The Court: Do you have them prepared?

Mr. McNabb: Yes, your Honor.

The Court: You will present them at this time. The plaintiff have any requested instructions? The Court at this time denies the motion of the defendant. Does the plaintiff have any requested instructions? I believe I asked.

Mr. McNealy: No, your Honor.

The Court: Very well. We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:25 p.m., the Court took a recess until 3:40 p.m., at which time it reconvened and the trial of this cause was resumed.)

Clerk of Court: Court is reconvened.

The Court: Gentlemen, do you suppose without the Court arbitrarily fixing the time for argument maybe we can agree to how much time the plaintiff wishes and the defendant?

Mr. Hepp: I propose, if the Court will advise how much time it wants for instructions that we split up the balance of the time.

The Court: Well, the instructions will not be ready [356] prior to argument.

Mr. Hepp: No, I understand that.

The Court: But the instructions are, I believe ready, will be, no matter how brief the arguments



are. In other words, the instructions are almost final.

Mr. Hepp: I believe, your Honor has stated what essentially the instructions, the pertinent ones which we would be interested in will be. I would be willing to— (Interrupted)

Mr. McNabb: Your Honor, I think each of us who have participated in this trial are sorely troubled concerning what is the applicable law. I think each of us thinks that he knows what law is applicable but because each of us has a perhaps separate and distinct opinion I request you now for an opportunity to examine the instructions prior to the argument for this reason, that it is not my intention to touch on any subject or state my opinion concerning any law which this Court feels is not applicable to this case. I do not know whether the Court at this time proposes to give the instructions which I have requested. I do not do this for the purpose of continuing this matter, but in justice to the Court and to the parties and to myself.

The Court: The, as I understand the Federal Rules of Civil Procedure of which I have not followed in all cases, as a matter of fact I believe in nearly every case that I have tried in this jurisdiction I have given copies of the proposed instructions to the attorneys prior to argument, which is a practice that [357] I rather like, but it is not required by the Federal Rules. You are entitled as I understand the rules to know the action taken by the Court on your requested instructions only and you are not entitled to the Court's instructions. The

reason that I have discontinued the previous practice of giving the attorneys the instructions is because I have seen them in this courtroom read from them to the jury and argue the law and I don't approve of that type of argument, but I understand your position, Mr. McNabb. You do not wish to argue, no attorney does, some point of law that might be opposite or contrary to the Court's instructions.

Mr. McNabb: That is correct, and I make this request to the Court not as to what the law is as regards my right to instructions prior to the argument or anything of the kind, but merely as a simple request.

The Court: Yes, and Mr. McNabb, if we are to follow that through that would apply to every case, would it not?

Mr. McNabb: Oh, that is indeed true. Certainly it would.

The Court: As I say, that is the theory under which I have been doing that, but I say I found some objections to it when the attorneys who have my instructions and start reading them to the jury and arguing at great length on the law of the case. Because of the hour of the day is another reason I have, I had decided to have you gentlemen argue before you received copies but if we want to await the instructions, at least the germane part, those that apply to this specific case. Those [358] would be the only ones you are interested in?

Mr. McNabb: Oh, my, yes. Of course, Judge, I think, the general ones I think we all know what

they are or will be. Now, I do not wish to burden the Court with this request and if the Court would prefer that we proceed.

The Court: No, I rather prefer the other arrangement. To me it looks more logical than the Federal Rules but who am I to challenge the Rules, but as a practicing lawyer I know that I always wanted to know before I argued what the Court was going to instruct the jury. Otherwise I felt that I didn't know what to argue. If we are to do that I will go back and check and see how long it will be.

Mr. Hepp: I have just been discussing this matter with Mr. McNealy. The plaintiff would be perfectly willing to start its argument on a factual basis relying upon its right of rebuttal in questions, that is interpretations of law as an attorney sees them in terms of argument to the jury. That way we may be able to avail ourselves of this time and thereby finish today at a reasonable hour.

The Court: And I like to bear in mind the convenience of the jury.

Mr. Hepp: We are willing to proceed under those circumstances. That will give the defense an opportunity to read the instructions before— (Interrupted)

The Court: Perhaps to best facilitate matters without [359] adjourning Court, I will step out for a moment and see what condition the instructions are in. Will counsel approach the bench, please.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the presence and hearing of the jury):

The Court: The only changes that I am making, I am making the defendant singular instead of plural. For one reason we lost a defendant and I wish to state, Mr. McNabb, inform him that his requested instructions one to five, inclusive, are each and all denied. I wish to state that if I felt that those instructions could be properly given I would feel it would be my duty to direct a verdict in favor of the defendant, so we are going on another theory. I will give you gentlemen copies of the proposed instructions. I now hand you each a copy. There will be no change except the word "defendants" where used will be changed to the singular, "defendant." And I will give you gentlemen each opportunities at this time before arguing to make exceptions to my instructions if you so desire.

Mr. McNabb: Your Honor, I take it that we will have the right to object prior to the time that the instructions are *ready* to the jury, when the instructions are in one group, the entirety. I do not wish to waive the right to object to this page, but— (Interrupted)

The Court: But the situation is this, Mr. McNabb, and [360] that is where you are perhaps getting into trouble, your only opportunity to except will be after the instructions have been given.

Mr. McNabb: Well, if I, Judge, if I understand this instruction correctly, after having gone through it hastily, it seems to me that the theory upon which this instruction is based is that of a breach of contract.

The Court: That is not the Court's view.

Mr. McNabb: At any rate, I wish to lodge an objection to this instruction, whatever it may be. I don't know how we can properly identify it at the time.

The Court: This is done at your request and accommodation to the parties and consistent, I believe, with proper procedure, while it is a departure from the Federal Rules.

Mr. McNabb: Judge, would you care to identify this though, just by some— (Interrupted)

The Court: I think for the purpose of Identification in the record you may say these are the special instructions which will be included in the general instructions.

Mr. McNabb: Well, I think I am going to object on the grounds that this instruction is not according to the law governing this case. The theory is on a breach of contract and that the evidence indicates that there was no contract.

The Court: Do you have any exceptions?

Mr. McNealy: No exceptions. [361]

(Thereupon, the attorneys withdrew from the bench.)

The Court: Now, gentlemen, the only thing left to determine is how much time you would like for argument. It is now ten minutes of four.

Mr. Hepp: The plaintiff will accept twenty or twenty-five minutes which, I think, doubled will still give the Court time to instruct the jury.

Mr. McNabb: Do you mean then forty or fifty minutes or do you mean that you would want twenty minutes for both of your presentations.

Mr. Hepp: Both sides. I mean if we could have, there are seventy minutes left in the working day and if you subtract twenty minutes for instructing the jury that will leave fifty minutes. We are satisfied with twenty-five of those.

The Court: You are satisfied, divide the twenty-five minutes.

Mr. Hepp: We will accept a total of twenty-five minutes.

The Court: Is that satisfactory, Mr. McNabb?

Mr. McNabb: Yes, your Honor.

The Court: Twenty-five minutes. Very well, the jury may be called.

(Thereupon, the jury entered the courtroom.)

The Court: Do the parties desire the argument to be taken by the official reporter?

Mr. McNealy: No, your Honor.

Mr. McNabb: Fine. [362]

(Thereupon, the official court reporter withdrew from the courtroom and the attorneys presented their arguments to the jury.)

(At 4:35 p.m., the Court took a recess to 4:45 p.m., at which time it reconvened, and the trial of this cause was resumed, the official court reporter then re-entering the court room.)

Clerk of Court: Court is reconvened.

The Court: Will counsel, please, approach the bench.

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

The Court: I don't wish to belabor you gentle-

men with stipulations. I am wondering whether we would stipulate or whether you gentlemen wish to stipulate that the verdict might be returned to the Clerk to be returned to the Court tomorrow.

Mr. Hepp: We were just talking about a sealed verdict.

Mr. McNabb: I think that is an excellent idea.

Mr. McNealy: We will stipulate.

The Court: And you wish to stipulate that the stenographer need not be present when the verdict is returned? Of course, the sealed verdict stipulation will take care of that.

Mr. Hepp: Satisfactory.

The Court: And the parties have any objection to the Clerk reading the instructions?

Mr. McNabb: Certainly not. [363]

Mr. Hepp: I don't have any.

Mr. McNealy: No.

The Court: Very well.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

The Court: At this time the Clerk of Court will read the Court's instructions to the jury. [364-5]

### Instructions to the Jury

Ladies and Gentlemen of the Jury:

It becomes my duty as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and

weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

2. In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies [366] therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

3. It appears from the evidence that plaintiff and defendant, R. P. Hill, undertook as co-sponsors to obtain from the Federal Housing Administration a commitment for a loan with the understanding that, should the commitment be granted, the plaintiff was to build a building for the defendant. It also



appears from the evidence that the commitment sought by the parties was granted, and that because of a disagreement between the parties the plaintiff did not build the building for which this commitment was obtained.

It is the contention of the plaintiff that his failure to build the building was the fault of the defendant, and it is the contention of the defendant that the failure of the plaintiff to build the building was the fault of the plaintiff. It is for you to determine from all of the evidence who was actually at fault.

If you should find from a preponderance of the evidence that the defendant was at fault, that both parties were equally at fault, or that neither was at fault, you [367] will return a verdict in favor of the plaintiff, and if you do not so find you will return a verdict in favor of the defendant.

If you find in favor of the plaintiff you will return a verdict in favor of the plaintiff for the value of the benefit which the defendant received as a result of the plaintiff's services and expenditures.

4. It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when you are convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them

favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the purpose of returning a verdict or solely because of the opinion of the other jurors.

5. You shall not consider as evidence any statement [368] of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the Court, and the inferences that you may reasonably draw therefrom, and in accordance with the law as I state it to you.

6. If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence **actually** offered by him on that point.

7. You are admonished to view with caution the testimony of any witness which purports to relate the oral admission of a party litigant.

8. You are not bound to decide in conformity with the testimony of a number of witnesses, which does not [369] produce a conviction in your mind, as against the declarations of a lesser number of other evidence which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

9. If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

10. If during this trial I have said or done anything [370] which has suggested to you that I favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are, or are not worthy of belief; what facts are, or are not, established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion

relating to any of these matters, I instruct you to disregard it.

11. The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. The presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony. [371]

The impeachment of a witness in any of the ways I have mentioned does not necessarily mean that his or her testimony is completely deprived of value, or that its value is destroyed in any degree. The effect, if any, of the impeachment upon the credibility of the witness is for you to determine.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you

may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she in other particulars sworn to the truth.

12. Upon retiring to the jury room you will select one of your fellow jurors to act as foreman, who will preside over your deliberations and who will sign the verdict to which you agree. In order to return a verdict it is necessary that all twelve of the jurors agree to the decision.

If you find for the plaintiff your foreman will insert into verdict No. I the amount of the verdict found for plaintiff and then date and sign that verdict. [372]

If you find for the defendant your foreman will date and sign verdict No. II.

As soon as all of you have agreed upon the verdict you shall have it signed and dated by your foreman and then return with it to this room.

Dated at Fairbanks, Alaska, this 4th day of August, 1955.

/s/ Vernon D. Forbes, District Judge

(At the conclusion of the Clerk of Court reading the Court's instructions to the jury, the following proceedings were had):

The Court: Will counsel approach the bench?

(Thereupon, the attorneys approached the bench and the following proceedings were had out of the hearing of the jury):

The Court: Gentlemen, before I hear from you

concerning your exceptions, I note the defendant Mary Hill still carried as a defendant in the verdict, and I think that it would be proper for me to strike therefrom, "and Mary Hill" and instruct the jury, that is inform the jury. Is there any objection to that?

Mr. McNealy: No objection, your Honor.

The Court: It is proper. Well, we can at this time conclude to take the exceptions, if any, to the instructions [373] of the Court.

Mr. McNabb: Do you have any objections?

Mr. McNealy: I have no objections. The plaintiff has none.

Mr. McNabb: Your Honor, the record will show that I have previously objected to Instruction No. 3, that is my previous objection was addressed to that which is now No. 3.

The Court: That's right.

Mr. McNabb: And I wish that objection to stand.

The Court: It will so stand.

(Thereupon, the attorneys withdrew from the bench and the following proceedings were had in the hearing of the jury):

The Court: Members of the jury, at the conclusion of the evidence in this case the Court dismissed the action insofar as the defendant Mary Hill is concerned and the verdicts were prepared prior to that dismissal and therefore I am changing the verdicts merely by striking out the words, "and Mary Hill" and making singular of the word defendants by striking out the "s". I merely state that

as an explanation for you. Now, will the Clerk, please, explain the duties and qualify the bailiffs.

[Endorsed]: Filed December 1, 1955.

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[Endorsed]: No. 14982. United States Court of Appeals for the Ninth Circuit. R. P. Hill and Mary Hill, Appellants, vs. A. E. Waxberg, doing business as Waxberg Construction Company, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed: December 22, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14982

R. P. HILL and MARY HILL,

Appellants.

vs.

A. E. WAXBERG, d/b/a Waxberg Construction  
Co., Appellee,

### STATEMENT OF POINTS ON APPEAL

Appellants having heretofore filed in the District Court for the District of Alaska, Fourth Division, a statement of points to be relied on on this appeal, said statement is hereby adopted by reference.

Dated at Fairbanks, Alaska, this 16th day of January, 1956.

/s/ GEORGE B. McNABB, JR.,  
Attorney for Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed January 23, 1956. Paul P. O'Brien, Clerk.



**United States Court of Appeals**  
**For the Ninth Circuit**

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R. P. HILL and MARY HILL, *Appellants,*

vs.

A. E. WAXBERG, doing business as WAXBERG  
CONSTRUCTION COMPANY, *Appellee.*

---

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF  
ALASKA, FOURTH DIVISION

---

**BRIEF OF APPELLANTS**

---

LANDON & AIKEN,  
355 Olympic National Building,  
Seattle 4, Washington.

GEORGE B. MCNABB, JR.,  
Fairbanks, Alaska.  
*Attorneys for Appellants.*

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THE ARGUS PRESS, SEATTLE

**FILED**

JUN - 4 1956

PAUL P. O'BRIEN, CLERK



**United States Court of Appeals**  
**For the Ninth Circuit**

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R. P. HILL and MARY HILL, *Appellants,*

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# United States Court of Appeals

## For the Ninth Circuit

R. P. HILL and MARY HILL, *Appellants,*

vs.

A. E. WAXBERG, doing business as  
WAXBERG CONSTRUCTION COMPANY,  
*Appellee.*

No. 14982

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF  
ALASKA, FOURTH DIVISION

### BRIEF OF APPELLANTS

### PLEADINGS AND FACTS

This appeal follows a trial before a jury, in an action brought by A. E. Waxberg, the respondent, against the appellants, R. P. Hill and Mary Hill, his wife. The first complaint served by the respondent was not filed and is not contained within the transcript on this appeal. The plaintiff served and filed a second amended complaint containing three causes of action (Tr. 3-11). He alleged in the first cause of action that on or about the 16th day of January, 1950, plaintiff and defendant entered into an oral contract whereby plaintiff agreed to construct a building under Section 608 of the Federal Housing Authority Act, and that plaintiff, in accordance with said oral contract, agreed to construct said building for the defendants at the cost of \$1,694,374.00. Plaintiff alleged a breach of this contract by the defendants and sought damages for \$50,826.00 as a reasonable contractor's profit. In his second cause of

action and, as an alternative cause of action or remedy, he alleged an oral agreement whereby the plaintiff was to construct a building for the defendants and went on to allege that in connection with said agreement he had incurred certain expenses and had rendered certain services for which he sought reimbursement in the total sum of \$6,583.15. For his third cause of action he incorporated the allegations of the first and second cause of action and asked, as an alternative recovery, for the reasonable value of his services to the defendants, together with his expenses of \$2,283.15.

The defendants in answer to the second amended complaint denied that a contract had ever existed between the parties; alleged that the defendants had made no request to the plaintiff to perform any services or expend any money; that plaintiff performed no services of value to the defendants; that any expenditures of time or money by the plaintiff were normal incidents of the contracting business as preliminary to or in an effort to secure a contract for the construction of a building; that as a condition to performing any agreement between defendants and plaintiff, plaintiff was to secure a contractor's bond which he was unable to do. The defendants denied the remaining allegations of the second amended complaint (Tr. 11-16).

At the close of the plaintiff's case the trial judge granted the defendants a directed verdict as to the first cause of action contained in plaintiff's second amended complaint (Tr. 181) and gave to the plaintiff the option of proceeding on either the second or third cause of action (Tr. 182). Plaintiff elected to proceed on the third cause of action (Tr. 182).



Prior to the putting on of the defendants' case the plaintiff moved for leave to file a third amended complaint, and this was granted by the court (Tr. 203). In his third amended complaint, plaintiff alleged that the parties had agreed that plaintiff was to construct a building, if and when an FIIA commitment was secured and after necessary plans and specifications were prepared to determine the cost of construction; that at the request of the defendants, plaintiff performed certain services and incurred certain expenses in connection with the application to the FHA; that after the issuance of the FHA commitment defendants demanded that plaintiff pay to them \$50,000.00 of the expected builder's profit for constructing said building, and upon plaintiff's refusal to do so, defendants severed their association with plaintiff; that, by reason of the transactions between the parties and by virtue of defendants failing to make a contract with plaintiff for a specified sum to construct the building for them, an implied contract existed to pay plaintiff for the reasonable value of his services and expenditures in connection with the FIIA commitment. The plaintiff prayed for a recovery from the defendants in *quantum meruit* for the reasonable value of his services and expenditures for the defendants' benefit (Tr. 17-20).

At the close of the trial the District Court dismissed the defendant, Mary Hill, from the action (Tr. 362). A verdict was rendered in favor of the plaintiff against the defendant, R. P. Hill, and judgment was entered thereon (No. 6481) (Tr. 25). After motions by the defendant to set aside the verdict and/or for a new trial

were denied by the court, notice of appeal was filed by the defendants (Tr. 28).

### **JURISDICTION**

Jurisdiction of the district court rests on the act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C. 101. The jurisdiction of this honorable court rests upon 28 U.S.C. 1291.

### **STATEMENT OF THE CASE**

This litigation arises out of a transaction wherein an apartment building was to be constructed in Fairbanks, Alaska. The respondent, A. E. Waxberg (plaintiff) was a building contractor residing in Fairbanks. During December, 1949, conversations took place between the appellant and respondent( Tr. 43), and as a result the respondent became a co-sponsor with the appellant and the appellant's wife in an application to the Federal Housing Authority. This application was to be submitted under Section 608 of the Federal Housing Authority Act, for a commitment to insure a loan. The loan was to be used to finance the construction of the apartment building. The building was to be constructed upon certain real property owned by the appellant; the property being located within the City of Fairbanks between First and Second Streets and fronting upon Lacey Street.

Mr. Waxberg testified that, as a result of the conversations occurring between himself and Mr. Hill, he understood that he was going to be the builder or contractor in the event that a commitment was received from the FHA (Tr. 45). There was never a written agreement between the parties.

The respondent testified that he performed or caused to be performed certain services in connection with the application for the commitment. He testified that he worked with architect Chiarelli & Kirk, hired by Mr. Hill to aid in preparing the documents necessary for submission with the application (Tr. 47 and 48); that he caused certain preliminary drilling to be done on the property upon which the building was to be constructed (Tr. 47), and that he made three or four trips to Seattle. In this connection he testified as follows (Tr. 49):

“Q. You spoke of having gone to Seattle. Do you recall the number of trips, if there were more than one, that you made to Seattle in connection with this building project?

A. I made three or four trips.

Q. What was the principal purpose of your making these trips?

A. Mostly in discussing the construction of the building with Hill and the design of the building with the architects and also helping with getting an estimate up to present to the F.H.A.”

Mr. Waxberg described the purpose of his activities in the following testimony (Tr. 125):

“Q. And in the event that, let me ask you this, is it your statement that the FHA absolutely guarantees a builder a profit of six per cent of the construction cost?

A. They don't absolutely guarantee it. It is allowed the builder and on the application and the breakdown of the cost and so forth it is set up. It is set up so much for the architect. He gets his fee and the contractor gets his.

Q. What you mean by that is that those amounts are allowable?

A. They are allowable, yes.

Q. But they are not guaranteed, are they?

A. No, they are not guaranteed, no.

Q. Fact of the matter is, when they make a commitment of this type it is to agree to guarantee a loan for construction?

A. That's right.

Q. And if you can't build the building for any less than that or if it costs that much without any profit, that is too bad, isn't it?

A. That's right. *That is the reason I spent all this time to see that we get a building the specifications and so forth that, so that I could make a reasonable profit.*

Q. Or at least make a profit, be able to construct a building?

A. Be able to construct the building and make a profit and we worked to the point of six per cent.

Q. Up to the time that these plans were submitted to the FHA there wasn't any price established, there wasn't any agreement, you were just trying to get something together that the FHA would loan money on, weren't you?

A. That's right."

Another witness, a Mr. Glenn Sumter of Seattle, Washington, called by the appellant, testified that his organization, a mortgage company, prepared the application for the FHA commitment (Tr. 215). This party also testified that the necessary preliminary drawings, or architectural exhibits, were obtained from the architectural firm of Chiarelli & Kirk (Tr. 216), the firm employed by Mr. Hill.

The application for the FHA commitment was submitted by Mr. Sumter (Tr. 215, 225), during the month of February, 1950.

The application was for a total construction cost of \$1,782,000.00. The FHA regulations provided that certain percentage fees would be allowed the builder, architects and others. Under the regulations the FHA could not guarantee a loan in excess of 90% of the "replacement cost" of the projection (Tr. 220). The appellant lacked the necessary capital to make up the remaining 10% of the replacement cost. For this reason the application indicated that Mr. Waxberg would not withdraw \$45,000.00 of his fee as a builder (5% or 6% of the construction cost) (Tr. 68, 222, 223).

The FHA commitment was issued during the latter part of February, 1950 (Tr. 230), in the amount of \$1,694,200.00. This meant that a mortgage would be insured up to this maximum figure (Tr. 231).

Only general preliminary plans or drawings were submitted with the application to the FHA and at the time of the issuance of the commitment no exact cost figures or working plans or drawings had been prepared (Tr. 53, 54).

Shortly after the issuance of the commitment the appellant and respondent became unable to agree to the terms under which they would be associated in the construction of the building. Mr. Hill testified that while the commitment price was for \$1,694,200.00 this figure, less certain expenses such as architectural fees, would reduce the amount available for the construction cost to about \$1,500,000.00 (Tr. 301, 302). Mr. Hill

described his conversation with Mr. Waxberg in the following manner (Tr. 303, 304) :

“Q. Did you discuss that matter with Mr. Waxberg in the New Washington Hotel?

A. I did.

Q. What was the extent of your conversation in that regard?

A. That that was all the money there was available for a contract was a million five hundred.

Q. What did he say in that regard?

A. That the commitment was for a million six hundred ninety-four thousand and he demanded that amount for the contract.

Q. Mr. Hill, could you possibly have given him that amount of money?

A. I know of no way in which I could have raised the amount of money to give him that amount.

Q. It was not available from the loan, was it?

A. No. (291)

Q. Did you ever agree to give him that amount of money?

A. No.

Q. What did Mr. Waxberg say then?

A. He said that he could not build and could not enter into a contract for anything less than the full commitment price.

Q. Did he make you at that time any counter-proposals?

A. I wouldn't call it a counter-proposal. There was more to his proposal.

Q. What did he say?

A. That if I would issue him fifty-one per cent of the stock in the corporation, give Mr. Orsini the

management contract then that he could sell stock and some of the remaining stock to raise this money.

Q. On that condition he would build the building?

A. On that condition he would build the building.

Q. Was that proposal acceptable to you, Mr. Hill ?

A. No. May I enlarge on that?"

Mr. Waxberg on the other hand testified that after the commitment was issued and during a conversation between himself and the appellant held in Seattle, Mr. Hill made a proposal to him (Tr. 53, 54):

"Q. In substance, what was, did Mr. Hill make a proposal to you concerning some money to be returned?

A. Yes, it was fifty thousand dollars is what another contractor had offered Mr. Hill as a kick-back and that was put to me that I should do that or else the thing would be off.

Q. If I understand you right, in other words, of the FHA money that was coming on the job fifty thousand dollars that would go to you would be paid over instead to Mr. Hill?

A. That's right, paid over to Mr. Hill instead of me. You see the FHA allows a certain amount, certain interest rate for a contractor's fee and I didn't know at the time because the plans had never been completed. All we had was preliminary drawings. Just enough to get the FHA commitment is all we had, preliminary drawings. It would be impossible for me to know whether there is ten thousand, five thousand or a hundred thousand dollars profit. It is the idea of getting the building

built. And I knew I was safe up to as far as within fifty thousand dollars at least (24). Well, when the demand is made that I kick back fifty thousand dollars, I couldn't see it. There is where . . . (interrupted)

Q. You refused Mr. Hill's proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?

A. That's right."

Each party, therefore, related a different version as to why they did not become associated in the construction of the building after the issuance of the FHA commitment.

Mr. Sumter testified that a revised or amended commitment was issued by the Federal Housing Authority approximately one year after the issuance of the original commitment, and a building known as the Polaris Building was constructed. Mr. Waxberg was not listed as a sponsor on this revised commitment. The building constructed was an apartment building but differed substantially in general design from the building originally planned (Tr. 124).

At the conclusion of all the evidence, appellant moved for a directed verdict in its favor, which motion was denied (Tr. 364).

The jury returned a verdict in the sum of \$11,067.46 against this appellant (Tr. 22).



## SPECIFICATION OF ERRORS

The District Court erred in:

1. Overruling defendants' motion for a directed verdict at the close of the plaintiff's evidence.

2. Granting leave to the plaintiff for the filing of an Amended Complaint subsequent to the defendants' motion for a directed verdict.

3. Refusing defendants' motion for a directed verdict at the close of the case.

4. Refusing to give the Defendants' Requested Instructions No. 1, 2, 4 and 5, reading as follows (Tr. 20-22):

a. Defendants' Requested Instruction No. 1.

"You are hereby instructed that the plaintiff is not entitled to a recovery against the defendants in any amount, if he performed services or expended money for the purpose of obtaining business through a hoped-for contract."

b. Defendants' Requested Instruction No. 2.

"If, in this case, you find that the services rendered by the plaintiff or the monies expended by him were as much in his interest or for his benefit as in the interest or for the benefit of the defendants, and were rendered and expended for the purpose of securing a commitment for insurance, and at the time that such services were rendered or monies were expended that the plaintiff had no expectation of charging therefor then, and in that event, you must find for the defendants and against the plaintiff."

c. Defendants' Requested Instruction No. 4.

"If you the jury believe that the plaintiff

rendered services or expended monies without an expectation of compensation from these defendants, you must find for the defendants and against the plaintiff.”

d. Defendants’ Requested Instruction No. 5.

“In this case, to find in favor of the plaintiff and against the defendants, you must be convinced by a preponderance of the evidence that, at the time the plaintiff rendered services or expended money, he then expected these defendants to pay him therefor, and that the services were rendered by the plaintiff and received by the defendants under such circumstances as to cause the defendants to expect that they were to pay therefor.”

5. Entering judgment upon the verdict of the jury, which was contrary to the evidence.

6. Entering judgment upon the verdict of the jury, which was excessive in amount.

7. Entering judgment upon the verdict of the jury when there was insufficient evidence to justify the verdict.

8. Refusing to grant the defendants a continuance after allowing plaintiff to file an amended complaint.

9. Entering judgment upon the verdict of the jury when the amount of the verdict was influenced by passion and prejudice against the defendants and was an excessive verdict.

10. Overruling defendants’ motion for judgment notwithstanding the verdict or for a new trial.

11. Giving its Instruction No. 3 to the jury, which reads as follows:

“It appears from the evidence that plaintiff and defendant, R. P. Hill, undertook as co-sponsors to obtain from the Federal Housing Administration a commitment for a loan with the understanding that, should the commitment be granted, the plaintiff was to build a building for the defendant. It also appears from the evidence that the commitment sought by the parties was granted, and that because of a disagreement between the parties the plaintiff did not build the building for which this commitment was obtained.

“It is the contention of the plaintiff that his failure to build the building was the fault of the defendant, and it is the contention of the defendant that the failure of the plaintiff to build the building was the fault of the plaintiff. It is for you to determine from all of the evidence who was actually at fault.

“If you should find from a preponderance of the evidence that the defendant was at fault, that both parties were equally at fault, or that neither was at fault, you will return a verdict in favor of the plaintiff, and if you do not so find you will return a verdict in favor of the defendant.

“If you find in favor of the plaintiff you will return a verdict in favor of the plaintiff for the value of the benefit which the defendant received as a result of the plaintiff’s services and expenditures.”

Appellant excepted to the giving of this instruction for the reason that it was not in accordance with the law governing the case, the theory of the instruction resting upon breach of contract when the evidence indicated that there was no contract between the parties (Tr. 369, 378).

## ARGUMENT

### I. The Evidence was Insufficient to Establish a Case For the Jury

Appellant will discuss together Specification of Errors 1, 3, 5, 7 and 10, relating to the question of whether the evidence was sufficient to establish a case for the jury.

The trial court directed a verdict against the plaintiff as to the cause of action in the second amended complaint based upon an express contract (Tr. 181). The court also should have directed a verdict against the plaintiff as to the cause of action presented in the third amended complaint. The evidence was insufficient to establish a case for the jury as to an implied contract or *quantum meruit*.

The respondent repeatedly testified that in performing his services relating to the application for the commitment, he expected no compensation from the appellant. By his own admission he was unable to establish a necessary element to recover upon an implied contract. Mr. Waxberg testified that (Tr. 282):

“Q. (By MR. McNABB): I say, at the time that you were working on this project did you intend to charge Mr. Hill for that work?

A. Well, not with the mutual agreement that we had, if the commitment was to go through, if the commitment went through I was to build the building and I had no intentions to be, I never even dreamed of getting kicked out of the deal. That is the bad part of it. If I had ever thought of that I would have had a written contract before we started, before I ever spent five minutes on it I would have had a written contract.”

As further proof of the respondent's intent at the time of rendering these services and incurring the expenditures, the following rather lengthy quotation is extracted from his testimony (Tr. 144, 145, 146) :

“Q. Al, you worked with Chiarelli and Kirk and were in Seattle on these various trips, the monies that you expended and the time that you consumed, you were supposed to have been paid for that from your normal builder's profit, were you not?

A. Well, that is a different deal. I can bid on jobs and never get the money as far as that goes, and that is expense that I have to stand. It is part of my business.

Q. *I say though, in this instance you were supposed to recover your costs for these trips to Seattle and the time that you spent with Chiarelli and Kirk and the like from the profit, from your builder's profit on this thing, were you not?*

A. *Well, yes, I expected to when the building was done why I would be.*

Q. *That is where you were to be repaid for any monies that you expended?*

A. *That's right.*

\* \* \*

(Tr. 147, 148)

Q. And there wasn't any agreement on Rudy's part to pay you for those expenses other than as it came back to you out of the building?

A. No, there was no agreement that I was going to be kicked out of there either after the commitment was made.

Q. But that is the way you were supposed to get this money back, wasn't it?

A. Well, yeah.

Q. From the building?

A. That's right."

He again reaffirmed the statement that he had not expected any compensation from Mr. Hill at the time he performed the services in other parts of his testimony (Tr. 283).

An essential element of recovery upon implied contract or *quantum meruit* is the performance of services with the expectation of payment. We find the doctrine stated in the following manner in the annotation at 54 A.L.R. 548, 550, Services-Implied Agreement Repelled :

" . . . it is equally true that when services are rendered without expectation of compensation on the part of the one rendering the service, or of an obligation to pay on the part of one receiving the benefit, no contract or agreement to pay is implied." *Hammond v. Consolidated Rendering Co.*, 125 Me. 491, 135 Atl. 197 (1926) ; *Carey Lithograph Co. v. Magazine & Book Co.*, 70 Misc. 54, 27 N.Y. Supp. 300 (1911).

The decision of *Baker & Company v. Ballantine & Sons*, 127 Conn. 680, 20 Atl. 2d 82 (1911), involved a problem quite similar to the one at bar. There the plaintiff had made certain expenditures in reliance upon obtaining an exclusive agency for the sale of the defendant's products. The jury had returned a verdict for the plaintiff for the reasonable value of services rendered. The court there stated (page 84) :

" . . . we point out that the plaintiff could not recover the expenditures which it made in pursuance of the agency upon the basis of an implied contract. The plaintiff evidently looked for its

compensation to the profits which would accrue to it from the sale of liquor supplied by the defendant; and it appears that in Baker's own testimony that he talked to Healy about certain advertisements he was doing and the latter stated that the defendant would not pay for that. There was lacking the elements necessary to give rise to an implied contract, that services were rendered by the plaintiff in the expectation that the defendant would pay it for them and were accepted by the defendant with knowledge of that expectation."

Clearly Mr. Waxberg did not expect any personal obligation on the part of Mr. Hill for the services in connection with the application. The possibility of his becoming the builder under the construction contract was sufficiently attractive that he performed certain services with the intention of obtaining reimbursement as a builder under the construction contract (Tr. 283).

Since at the time of performing these services the respondent expected no personal obligation on the part of the appellant, he cannot, as an afterthought, assert a claim in *quantum meruit*. The reasoning of the court in *Baker & Co. v. Ballantine & Sons*, 127 Conn. 680, 20 Atl. 2d 82, *supra*, is fully applicable to this situation in denying the plaintiff a cause of action in implied contract or *quantum meruit*. See also *Brightman v. Oglethorp Telephone Co.*, 47 Geo. 521, 171 S.E. 162 (1933).

Appellant suggests that the following language from a decision of this court, *State of Washington v. United States* (9 Cir., 1954) 214 F.2d 33, sets forth the standard or test under which the trial court should have directed a verdict in favor of the defendants (214 F.2d 33, 40, 41) :

“Where there is substantial evidence on both sides of an issue, the court is not free to re-weigh the evidence and substitute its inference or conclusions for that of the jury. *Tennant v. Peoria & P. U. Ry. Co.*, 1944, 321 U.S. 29, 64 S.Ct. 409, 88 L.ed. 520; *Butte Copper & Zinc Co. v. Amerman*, 9 Cir., 1946, 157 F.2d 457. However, in making the primary determination as to whether or not there is substantial evidence, a district judge is not a ‘mere automation.’ *Gunning v. Cooley*, 1930, 281 U.S. 90, 93, 50 S.Ct. 231, 74 L.ed. 720; *United States v. Burke*, 9 Cir., 1931, 50 F.(2d) 653, 657. He must determine ‘not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it.’ *Improvement Co. v. Munson*, 1871, 14 Wall, 442, 448; *Butte Copper & Zinc Co. v. Amerman*, *supra*, 157 F.2d at page 458.

“The crux of the matter is whether there is substantial evidence to support the verdict.”

For the reasons which this appellant has discussed in the foregoing argument, there was no substantial evidence establishing the elements of an implied contract or *quantum meruit*. The trial court should have directed a verdict for the defendants.

## II. The Court Erred in Refusing to Give Each of the Defendant's Requested Instructions

It was the respondent's theory, as set forth in his third amended complaint, that the appellant was liable in *quantum meruit* for the reasonable value of his services and expenditures. The court had dismissed respondent's cause of action on express contract at the close of the respondent's case.



However, the instructions given by the court do not embody the respondent's theory. Appellants' counsel excepted to the giving of the court's Instruction Number Three for the reason that it was based upon the theory of breach of contract (Tr. 369, 378).

As appellant has previously suggested, an essential element of *quantum meruit* is the performance of services with the expectation of payment (See *Curran v. Smith* (1906 Cir.) 149 Fed. 945 and *Western Oil Refining Co. v. Underwood*, 83 Ind. App. 488, 149 N.E. 85 (1925); annotation 54 A.L.R. 548, Services-Implied Agreement Repelled.

Appellants' Requested Instructions Number 1, 2, 4 and 5, quoted verbatim in appellants' Specification of Errors herein, set forth the principles that services must be rendered with the expectation of compensation to be received from the one obtaining the benefit of these services. See 54 A.L.R. 548, 554, Services-Implied Agreement Repelled, wherein it is stated:

"Before a request for, or acceptance of, services on the part of the beneficiary will imply an intent on his part to pay therefor, it must appear that the services were rendered under such circumstances that it may be fairly inferred that it was the intent of the party rendering them that the beneficiary should pay."

Appellants' Requested Instructions Number 1, 2, 4 and 5 correctly stated the law applicable to the case. The instructions correctly define the issues presented and should have been submitted to the jury.

The respondent stated repeatedly that at the time of performing the services, even assuming that they were

an aid in obtaining the commitment, he did not expect compensation from the appellant. The court erred in failing to give appellant's requested Instructions Number 1, 2, 4 and 5.

### III. The Court Erred in its Instructions to the Jury

The court's Instruction Number Three removes from the jury any question as to the finding of an implied contract or the elements of *quantum meruit*. The only issue left to the jury was the question of fault as to why the building was not constructed.

There was no opportunity for the jury to consider the question of the intent of the parties relating to the obligation that should arise from the performance of certain services by the respondent. In view of the evidence produced in the trial of the case such an instruction was erroneous.

The court's Instruction Number Three also stated that the respondent was entitled to recover even though both parties were at fault in preventing the construction of the building. Even under the theory apparently adopted by this instruction it is submitted that this portion of the instruction is not a correct statement of the law. In this connection see American Jurisprudence, Building and Construction Contracts, Section 44, wherein it is stated:

"The general rule that where a party has partially, but not substantially performed his promise contained in an entire contract, and the failure to perform the balance of the contract is not excused, no recovery can be had on the contract or upon a *quantum meruit* applies to building and construction contracts."

#### IV. The Verdict of the Jury Was Excessive in Amount

The appellant will discuss together Specification of Errors Number 6 and 9, relating to its contention that the verdict of the jury was excessive.

The trial court instructed the jury that if it found for the plaintiff a verdict should be returned "for the value of the benefit which the defendant received as a result of the plaintiff's services and expenditures" (Tr. 373, Court's Instruction Number 3).

The services rendered by the respondent were for the most part, if not entirely, incidental to the application for the FHA commitment (Tr. 49, 50).

The only testimony produced by the respondent as to the reasonable value of his services *to the appellant* is contained on page 73 of the transcript. The respondent there stated:

"Q. (By MR. HEPP): Can you state the reasonable value, Mr. Waxberg, of your services to Mr. Hill in connection with the preliminary surveys, all that work that you did which he profited by, if any, up to the point of FHA commitment?"

MR. MCNABB: Object to that as being not the best evidence, calling for a conclusion.

THE COURT: He may answer.

MR. WAXBERG: Well, yes, I feel that I lost out in many ways by spending my time on this particular project.

Q. (By MR. HEPP): We are now talking about the value of services to Mr. Hill as set forth in your third cause?

A. Well, it is certainly worth a hundred dollars a day for my time that I spent on it.

Q. How many days did you spend?

A. I believe it was forty-three days."

The respondent produced no other evidence as to the *value of his services and expenditures to the appellant*. He was bound to produce such evidence in order to establish his right to recover against the appellant. See Williston, Contracts, Sec. 1482 (1937).

Mr. Sumter testified that the *value of the commitment* to the appellant was not in excess of \$4,800.00 (Tr. 268). It must be remembered that the respondent performed only part of the services that went into the work preliminary to obtaining the commitment (Tr. 215, 216).

The verdict of the jury in the amount of \$11,067.46 was not based upon the evidence produced at the trial nor was it in accordance with the instructions of the court and was, therefore, clearly excessive. Under the most favorable interpretation of the respondent's own testimony he was not entitled to damages in excess of \$4,300.00.

## CONCLUSION

The appellants respectfully submit that the contentions which they have herein urged are fully substantiated by the record, and that the trial court committed error as pointed out in each of the appellants' Specification of Errors. Each of the error committed was prejudicial to the rights of these appellants. Again appellants submit that there is no substantial evidence to sustain the jury verdict. We therefore respectfully ask this court to reverse the judgment entered below.

Respectfully submitted,

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**No. 14,982**  
**United States Court of Appeals**  
**For the Ninth Circuit**

---

R. P. HILL and MARY HILL,  
*Appellants,*

vs.

A. E. WAXBERG, doing business as Wax-  
berg Construction Company,  
*Appellee.*

**Appeal from the District Court for the  
District of Alaska, Fourth Division.**

**BRIEF OF APPELLEE.**

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**FILED**

**JUL 25 1956**

**PAUL P. O'BRIEN, CLERK**





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No. 14,982

# United States Court of Appeals For the Ninth Circuit

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R. P. HILL and MARY HILL,  
*Appellants,*

vs.

A. E. WAXBERG, doing business as Wax-  
berg Construction Company,  
*Appellee.*

Appeal from the District Court for the  
District of Alaska, Fourth Division.

## BRIEF OF APPELLEE.

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### JURISDICTION.

The jurisdiction of this Court is invoked by the provisions of Title 28 U.S.C.A. Section 1291 and Section 1294, paragraph 2.

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### STATEMENT OF CASE.

Appellee was a contractor, at all times mentioned herein, in Fairbanks, Alaska. His testimony was that he first entered negotiations to build a building for Appellant in December, 1949. (TR 43) under a verbal

agreement "that it more or less grew as we progressed" (TR 45).

An outgrowth of this meeting was that Appellee became a co-sponsor with Appellants to construct a building under Section 608 of the Federal Housing Authority. It is not too early to state that while the actual building discussed and planned was not built, a building was later constructed by Appellants in which was incorporated much of Appellee's efforts, including the FHA Commitment, revised.

Invitations to bid on the construction were never given by Appellants as is usual where the contractor must supply cost figures at his own expense (TR 45-46).

In connection with the building and securing an FHA Commitment therefor, Mr. Waxberg testified that Mr. Hill asked him to come to Seattle to confer with architects Chiarelli and Kirk (TR 46) and that he did so (TR 47); that at the request of Mr. Hill, respondent hired William Equipment Company to secure a drill log (TR 47) and that he, Waxberg, paid for the same (TR 48); that he caused a survey to be made at request of Appellants (TR 48); that Appellee made "three or four" trips to Seattle on the project and that an FHA Commitment was issued (TR 49).

Mr. Waxberg further testified that after the FHA Commitment was secured, both he and the architects were "kicked out" (TR 51). He went on to testify that in May, 1950, Mr. Hill proposed that Waxberg

pay to Hill the sum of fifty thousand dollars of the builder's expected profit and when he refused, Mr. Hill dismissed him and ended all relationships (TR 52-54).

After Plaintiff below rested his case, a motion was made for a directed verdict by Defendants' attorney (TR 167). Later, Appellee elected to stand on his third cause of action (TR 182) and (TR 203) with leave of the Court, Plaintiff below filed his third amended complaint to conform to the testimony of Waxberg which went into the record without objection.

Glenn Roy Sumter, President of Washington Mortgage Company, was the first witness for Defendant below who testified as to meeting Mr. Waxberg and traveling in company with him to Juneau in connection with the subject matter of this case (TR 225-226).

That he, Sumter, prepared the application for the FHA mortgage for the building involved in this action on which Waxberg was a co-sponsor. Mr. Sumter further testified (TR 220-221) as follows:

“Q. Now, let me ask you, do you know why Mr. Waxberg is shown as participating to the extent of forty-five thousand dollars here in the application?

A. Yes. As I previously stated at that time Mr. Hill did not have the resources to, other than land, to construct it, or finance the equity requirements and forty-five thousand of the contractor's allowable fee was to be used as equity capital.

Q. And do you know why Mr. Waxberg's name was placed on the application?

A. As I recall at that time he was interested in building the proposed building for them."

and at TR 266-268 on re-cross as to the value of the FHA Commitment which Mr. Waxberg co-sponsored, we find:

"Q. Now you say there is another section under which this building could have been built; why didn't you use that instead of revising this original commitment?

\* \* \* \* \*

A. The matter of fees. He paid three and one-half per thousand for the processing of this application. In order to switch to a Section 207 he would lose his entire fee. Also the charter under which the 608's were controlled by the Federal Housing Administration were far more lenient than the charter under Section 207.

\* \* \* \* \*

Q. How much would that amount to?

A. Around forty-eight hundred dollars.

\* \* \* \* \*

A. Yes, it was worth forty-eight hundred dollars.

Q. In terms of cash, and in terms of leniency and operation it could be an unmeasurable value but nevertheless in terms of dollars and cents of considerable value to an owner, is that right?

A. Yes.

\* \* \* \* \*

Q. Up to this point then at least there have been benefits gained under the commitment which Mr. Waxberg co-sponsored?

A. I think forty-eight hundred dollars or thereabouts is."

At TR 271 Mr. Waxberg was called to testify for the defendants below. Counsel for Mr. Hill examined at length as to how Waxberg arrived at a figure of forty-three days time spent on the project commencing on TR 276-278.

Rudell P. Hill, the Appellant was the next witness and first testified that Waxberg was a co-sponsor for the FHA Commitment and had agreed to leave forty-five thousand dollars of the builder's profit in the building and at (TR 298) :

“Q. Was the, was a commitment issued on the basis of this application?

A. It was.”

Mr. Hill at TR 303-304 testified that it was Waxberg who breached their agreement and his testimony was generally conflicting as to material points with that of Waxberg, concerning who was at fault.

It appears from the general testimony of both contestants that there was some sort of agreement between them. Both parties agreed that a commitment for FHA approval was applied for by them; that if a commitment was not granted the Appellee Waxberg was to forget his loss, but if a commitment was issued Waxberg was to build the structure.

Mr. Hill testified he wanted Waxberg to build the building, it was agreed the commitment was issued and thereafter the parties fell into dispute, each claiming the other at fault.

The Court left the matter to the jury and they returned a verdict for \$11,067.46 for the Appellee.

**ANSWER TO APPELLANTS' SPECIFICATION OF ERRORS.**

Answer to errors specified are numbered to correspond with Appellants' brief as follows:

1. Reading of the transcript discloses sufficient facts to submit the case to jury.

2. Rule 15(b) Federal Rules of Civil Procedure provides for amendment of pleadings to conform to the evidence "upon motion of any party at any time, even after judgment" and we believe the Court properly allowed the filing of the third amended complaint to conform to the evidence and testimony that went in without objection of Defendant below.

3. Again we believe the transcript discloses facts worthy of consideration by the jury and that a directed verdict would have been error.

4. Counsel believes that Defendants' Requested Instructions No. 1, 2, 4 and 5, were improper; that the Court acted properly in excluding them; and that if the same had been given they would have, in effect, been a directed verdict for Appellants in the Court below which was not warranted under the fact situation.

5. The jury heard the facts and it must be assumed the evidence was sufficient to convince them as to their verdict.

6. As to the verdict being excessive we believe the amount was justified by uncontradicted testimony of the respondent and of Exhibits admitted to evidence without objection together with testimony of Appellants' witnesses, as follows:



(TR 58) A. E. Waxberg testified he furnished service for forty-three (43) days at a reasonable value of one hundred dollars (\$100.00) per day.....	\$4300.00
(TR 61) Hotel and other bills were marked for identification Nos. 1 to 7...	?
(TR 158-163) Identification No. 8 marked showing expenses amounting to \$1688.88 less \$92.00 (TR 163) or.....	1596.88
And at TR 164-165 Identifications Nos. 1, 2, 4, 5, 6, 7 and 8 were admitted without objection .....	?
At TR 276-278 Waxberg was cross-examined regarding the bills	
TR 268 places the cash benefit of the FHA Commitment to Appellants at....	4800.00
	<hr/>
	\$10,696.88

Since the total amount of hotel bills admitted in evidence is not shown in figures in the transcript and since the Appellants' witness, Glenn Roy Sumter, stated at TR 268 the FHA Commitment had a value in addition to the \$4,800.00 liquidated value it is safe to assume these facts would easily allow the jury to find an additional sum of \$370.58 to arrive at their verdict of \$11,067.46 (TR 22).

7. This point hardly merits answer and is covered in paragraph 5 supra.

8. We urge that granting a continuance was discretionary with the lower Court; that the facts alleged in the third amended complaint conformed to the evidence; that such facts went in without objection by the

then Defendants' counsel; and that no element of surprise or prejudice to Appellants' case was caused by the Court's denial of a motion to continue the cause after the jury had been sitting on the case.

9. This point is answered in paragraph 6 supra.

10. After the verdict there were no developments warranting a new trial or judgment notwithstanding the verdict.

11. Instruction No. 3 complained of was not error. It contained a true statement of the case based on the testimony of both Plaintiff and Defendant below. The greater weight of the evidence was that the Respondent, Waxberg, did not intend to furnish services and pay expenses for Appellants gratuitously and therefore an implied contract to pay for the reasonable value could be assumed. The instruction left it to the jury to decide from the facts which of the parties, if either, was at fault.

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## **LAW AND ARGUMENT.**

### **I. EVIDENCE WAS SUFFICIENT TO ESTABLISH A CASE FOR THE JURY.**

Appellee has proceeded in this cause on the theory of unjust enrichment and that there arose between the parties a quasi contract or implied agreement that Respondent Waxberg would receive value for his services and expenses that benefited the Appellant Hill.

The lower Court at TR 285 summed up a reasonable theory of the case when the judge stated in part:

“He (Waxberg) didn’t expect or have any agreement for dollars and cents payment by the Hills to him, but he expected something in return for his services \* \* \*”

At TR 45 we find testimony of Appellee:

“Q. (By Mr. Hepp.) As a result of these discussions you had with Mr. Hill or that he had with you was, was there any agreement formed between the two of you?

A. A verbal agreement, yes.

Q. When did that occur, sir?

A. Well, I would say that it more or less grewed as we progressed with the deal. I was led to believe that I was going to do the building of this. All we had was a mutual understanding and he kept calling me from time to time. He would be in Seattle, he would call me to do this and ask me to do that and I naturally thought that and he led me to believe that we were going to put up the building together.”

*Troyer v. Fox* at 298 Pac. 733 states:

(4) Both express and implied contracts grow out of intentions of parties to transaction, and in each case there must be a meeting of the minds.

And at (4) page 739:

“A true implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances, and not from their words either spoken or written. Like an express contract, it grows out of the intention of the parties to the transaction, and there must be a meeting of the minds. Such a contract differs from an express contract only in the mode of proof.”

TR 46-50 sets out services performed and expenses incurred by Mr. Waxberg for Mr. Hill including the FHA Commitment.

Then Waxberg testified at TR 51:

“Q. Did you build this building for Mr. Hill?

A. No.

Q. Why not?

A. Well, to put it in plain words, I was kicked out.

Q. By whom?

A. I would say by Mr. Hill.”

In *Thurston v. Nutter*, 47 A.L.R. 1156 (134 Atl. 506) at page 1161 in text we find:

“But if the agreement, instead of being contended by the Plaintiff or by the Defendant, was not completed because there was not a clear accession on both sides to one and the same set of terms (*Wiswell v. Bresnahan*, 84 Me. 398, 24 Atl. 885), or a complete mutuality of engagement so that each one had the right at once to hold the other to a positive agreement (*Preble v. Hunt*, 85 Me. 267, 27 Atl. 151), then the Plaintiff could maintain an action on a quantum meruit because, where one party renders services beneficial to another *under circumstances that negative* the idea that the services were gratuitous, and the party to whom the services are rendered knows it and permits it and accepts the benefit, he is bound to pay a reasonable compensation therefor. That is because such facts and *circumstances justify a presumption* that the party to whom the services are rendered must have requested them, and therefore the law implies a promise on his part to pay for them. *Wadleigh v. Katahdin Pulp & Paper Co.* 116 Me.

113, 100 Atl. 150. We think the circumstances here satisfy the rule, if the minds of the parties did not meet. The amount of benefit to the Defendant would be a question of fact for the determination of the jury." (Emphasis ours.)

In the case at bar the testimony is replete with benefits to Mr. Hill as the result of Mr. Waxberg's services (TR 46-50; 220-221; 266-268), etc. Nowhere is there testimony at the trial that the services and expenses were furnished gratuitously. Conversely, the agreement in effect was that Waxberg was to help secure an FHA Commitment and if a commitment was granted then Waxberg was to construct a building for Hill.

At TR 123 we note Waxberg on cross-examination:

"A. Well, you must remember that this is not bidding on a job. This is strictly promoting enough plans and specifications in order to obtain an FHA mortgage and this is not bidding on it. It is just helping Mr. Hill get this FHA mortgage is what that, that is all that is.

Q. So actually up to that time you had no firm agreement with Mr. Hill to build any kind of a building, did you?

A. Well, I certainly did. I wouldn't go down to Seattle. I wouldn't have been working on this thing all the time. My name wouldn't be on the commitment or application if there hadn't been some agreement and we had to hurry things in order to get under the deadline and if it hadn't been for that application and commitment issued under the deadline there would be no Polaris Building today because there wouldn't have been

an application in for a commitment issued which had been revised after the commitment was issued, I was through.”

*Brown v. Crown Gold Milling Co.*, 89 Pac. 86:

“(2) In an action to recover the reasonable value of services performed, that a contract claimed to have been entered into between the parties was so indefinite that it could not be made the basis of recovery is immaterial, where evidence as to the contract was introduced to show the terms and nature of Plaintiff’s employment, and together with proof of its breach, was to be used as a basis of recovery for reasonable value.

(3) Where an employee is discharged without cause during the term of his employment, he may regard the contract as rescinded, sue on a quantum meruit, and recover the reasonable value of his services as if the special contract of employment had never been made, whether the contract was valid or invalid.”

It does not seem just or reasonable that the Appellant should be allowed to “unjustly enrich” himself where the testimony is replete with statements that Appellee Waxberg did not intend to work for nothing and where he was requested to do things by and for Mr. Hill as witness some of Waxberg’s testimony:

At TR 47:

“A. Well, about the first thing, Mr. Hill was in Seattle as I recall, he phoned me and wanted me to get a drill down on the ground as, to, for the foundation, what would be required for the foundation of the building.”

And at TR 48:

“Q. Well, under the similar circumstances I had Edgar Philleo make a, take a survey of the grounds and adjacent buildings and make a plot plan which was agreed by Mr. Hill. He asked me to get this work done.”

46 *American Jurisprudence*, page 99, in the second paragraph recites:

“It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, \* \* \*”

In the case at bar Appellant Hill benefitted as the result of Waxberg's efforts both in securing data for building plans as well as the essential role in securing the FHA Commitment later used in a revised form (TR 124 and TR 266-268).

The Appellants' enrichment is a direct and immediate, not an indirect or collateral, consequence of the acts of Appellee Waxberg.

In re *Estate of Walton*, 238 N.W. 577:

“It is elementary that ordinarily where one person performs services for another which are known to and accepted by him, the law implies a promise to pay therefor.”

And on cross-examination at TR 146-147 Waxberg testified that the usual method was to recover

expenses only if the contractor built the building, and showing a difference in the instant case. In part the testimony was:

“Q. And that is what was anticipated in this case, you and Rudy are going in together, build this building, you were going to build the building and any expenditures the same as Rudy spent his time on the thing, to you by way of the profits in the building, to him by ownership in the building?”

A. Well, this is a little different situation. Had Rudy come with plans and specifications, this building as it is now, how much will you build this building for and I give him a figure then I am out, *but I helped promote this deal.* (Italics ours.)

Q. *I know you did.* (Italics ours.)

A. And it is altogether different than normal contracting operations.”

Certainly this is not the testimony of a man who intended his services to be gratuitous. It is true that had Waxberg built the building he would have recovered his expenses from the profits, if any. Why did he not build the structure?

(TR 54) testimony of Waxberg on direct:

“Q. You refused Mr. Hill’s proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?”

A. That’s right.

Q. Is that when you were dismissed, Mr. Waxberg?

A. Yes, that is when Mr. and Mrs. Hill left my room and I never saw them after that for



months. I tried to contact them but I couldn't get yes or no out of them.

Q. Have you, were you at that time and since, ready, willing and able to perform your agreement with the Hills in constructing that building?

A. I was any time that the plans would have been completed so that I could give a definite figure, I was ready to go and able to go.

Q. Do you know whether a building was ever constructed on these premises?

A. Yes.

Q. Do you know who constructed that building?

A. S. S. Mullen."

And on cross-examination of Waxberg at TR 145:

"Q. No, I say though after the commitment was issued and before you were kicked out, did you ever talk dollars to Rudy?

A. No, other than what, I remember one discussion about that if, I was to kick back fifty thousand dollars to him."

And continuing at TR 148:

"Q. Well, now, Al, when was this discussion when he demanded the fifty thousand dollar kick-back?

A. Oh, yes, that's right, too. That was in New Washington Hotel, I remember that, but what date. That must have been after the commitment was issued."

Appellee concedes that Waxberg was at the outset to be reimbursed for his preliminary services by constructing the building for Hill but the weight of the testimony was to the effect that Appellant Hill made

the construction impossible. We believe the following case, though concerning a will rather than a contract is in point:

*Martin v. Wright's Adm'rs*, 28 Am. Dec. 468:

“Where one performs services for another under a mutual understanding that the latter will make compensation therefor by a legacy in his will, such services are not gratuitous, and if the recipient of them does not give the expected legacy, an action lies against his representative for their value.”

Also called to attention is:

*Pierson v. Pierson*, 115 P. 2d 742

“(10) Where one party to a contract for services renders it impossible for the other party to carry out the contract, the latter may recover on a quantum meruit for services rendered up to the time of the breach.”

Or did the Appellants Hill merely use Waxberg and at some time in their dealings after they had safely secured the FHA Commitment, conceive the intent of securing another contractor more amendable to his or their terms?

*Boardman v. Ward*, 42 N.W. 202, 12 Am. St. Rep. 749:

“Where a person, under a mistake of fact, is induced by fraud or concealment of another to perform for him valuable services, the law implies an obligation to pay what the services are reasonably worth, and assumpsit lies to recover the same, although when rendered there was no expectation that they should be paid for.”

In addition to testimony already quoted as to Waxberg being "kicked out" of the deal, we find many more references to the breach caused by Mr. Hill at TR 53-54, 69 and at TR 145-148, concerning the "kickback" of fifty thousand dollars to Mr. Hill for Waxberg to construct the building.

Appellee cannot agree that the case of *Baker & Company v. Ballantine & Sons*, 20 Atl. 2d 82, et seq. cited in Appellants' brief is in point. Using Appellants' quotation is part from page 84:

"\* \* \* and it appears in Baker's own testimony that he talked to Healey about certain advertising he was doing and the latter stated that the Defendant *would not pay* for that." (Italics ours.)

There is no statement of Mr. Hill in the record that he would not pay for Waxberg's services if Waxberg did not construct the building.

A case very similar to the one at bar and which is more eloquent than counsel is cited as follows:

*City Ice & Fuel Co. v. Bright*, 73 F. (2d) 461.

This was an action for compensation for data furnished Appellant and used by it. The first count of Plaintiff in lower Court alleged an express contract; the second was based on quantum meruit.

The Court directed a verdict for Defendant upon the count alleging an express contract, but submitted the case on quantum meruit to the jury.

In the syllabus we find:

"3. Law will imply a contract to pay for information from circumstances that party to whom

furnished recognized its merit, accepted it, and made full use thereof as basis for purchase of ice plants and businesses.” (Supported by 4 and 5.)

“6. One accepting another’s services need not have believed that latter expected pay therefor to become liable for compensation, but is bound to pay if he should have understood, as a reasonable man, from what he knew, that pay was expected.” (63 N.E. 947.)

---

## II. DEFENDANTS’ REQUESTED INSTRUCTIONS.

As elsewhere stated herein under Specification of Errors, we believe the then Defendants’ instructions were properly refused in that to have given them would have in effect been a directed verdict unwarranted under the evidence.

Appellants chose to ignore all testimony as to Appellee expecting compensation in the form of a construction contract, and argued that Hill was entitled to the benefits without any compensation therefor. A more flagrant case of unjust enrichment can hardly be imagined and apparently the jury was of that opinion.

---

## III. COURT’S INSTRUCTIONS.

The Court’s Instruction No. Three contains a clear and concise statement of the evidence in the case.

Certainly Appellants cannot prevail under any type of contract if their fault is the reason for an agreement not being completed.

Mr. Waxberg testified at TR 68:

"A. Well, it was a mutual agreement that I was to be the builder and he (Hill) was to be the owner of the building and I was to get for my risk and my share of the profit would be what the FHA allows which is six per cent on the total amount of the commitment. See in other words, the builder's fee, which is standard all over the country, is six per cent of the commitment.

Q. You mutually agreed with Mr. Hill, now there must have been more to it. What was all contained in that agreement, if anything more?

A. Well, that I was to help promote the building and help get the plans completed and, which I did everything I could. We got the commitment."

And at TR 313 on cross-examination by Mr. McNabb, Hill stated:

"Q. Mr. Hill, were you willing that Mr. Waxberg should build this building?

A. Yes. I should have preferred a local builder on the building.

Q. Why did he not build it?

A. Because I could not pay the price he asked to build it."

But see TR 54 by Waxberg on direct:

"Q. You refused Mr. Hill's proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?

A. That's right.

Q. Is that when you were dismissed, Mr. Waxberg?

A. Yes. \* \* \*"

And again at TR 94 on cross-examination of Waxberg:

“Q. (By Mr. McNabb.) Now, I believe you testified on direct examination that not only you but Chiarelli and Kirk and Orsini were all fired?

A. That’s right.

Q. As quickly as the commitment was issued.

A. That’s right.”

The testimony merely shows an agreement of sorts between the parties. The understanding between them in the light of surrounding circumstances and events was such as to imply an obligation on the part of Hill to pay Waxberg for the reasonable value of benefits retained by Hill.

The implication is there by law and the jury was properly instructed as to quantum meruit where Instruction No. Three stated:

“\* \* \* for the value of the benefit which the defendant received as a result of plaintiff’s services and expenditures.”

The fact that the lower Court did not use the words “implied contract” or “quantum meruit” in no wise lessens its presence, nor would the inclusion of such language have benefited Appellant.

If it were true that both parties were at fault, nonetheless, Hill should not be allowed to unjustly enrich himself at Waxberg’s expense.

Even if the instruction is questioned by the Appellate Court, the almost conclusive evidence favoring Appellee should be considered as in:

*United States Potash Co. v. McNutt*, 70 F. (2d)  
126

“18. Party is not entitled to a second trial where correct verdict is inescapable conclusion from facts found by the jury in response to erroneous instruction.”

---

#### IV. EXCESSIVE VERDICT.

We believe that in the answer to Specification of Errors *supra* it is established the verdict is not excessive (TR 58, 61, 158-163, 164-165, 276-278, and 268).

The testimony of Mr. Waxberg (TR 40) showed he had been a builder and contractor for about thirty years. As such he was certainly qualified to testify as to the value of his time. This together with proven expenses and the testimony of Mr. Sumter for Mr. Hill, none of which was controverted by the defense, established the basis for the jury's findings.

---

#### CONCLUSION.

It is urged that the jury heard the testimony and viewed the evidence and the demeanor of the parties and their witnesses, and fairly arrived at their verdict.

It is difficult to fathom the mind of the Appellants and to find any justification for refusal to pay for the benefits had and retained by him as the direct result of Appellee's efforts and services.

Waxberg's testimony throughout indicated that he always expected to be compensated in some form for his efforts, and nowhere does Mr. Hill urge that the services were considered gratuitous.

The parties had a fair trial and the decision of the lower Court should be affirmed.

Dated, Fairbanks, Alaska,  
July 16, 1956.

Respectfully submitted,  
R. J. McNEALY,  
EVERETT W. HEPP,  
By R. J. McNEALY,  
*Attorneys for Appellee.*



No. 14982

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**United States Court of Appeals**  
**For the Ninth Circuit**

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R. P. HILL and MARY HILL,    *Appellants,*  
vs.

A. E. WAXBERG, doing business as WAXBERG  
CONSTRUCTION COMPANY,    *Appellee.*

---

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF  
ALASKA, FOURTH DIVISION

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**APPELLANTS' REPLY BRIEF**

---

LANDON & AIKEN,  
355 Olympic National Building,  
Seattle 4, Washington.

GEORGE B. McNABB, JR.,  
Fairbanks, Alaska.  
*Attorneys for Appellants.*



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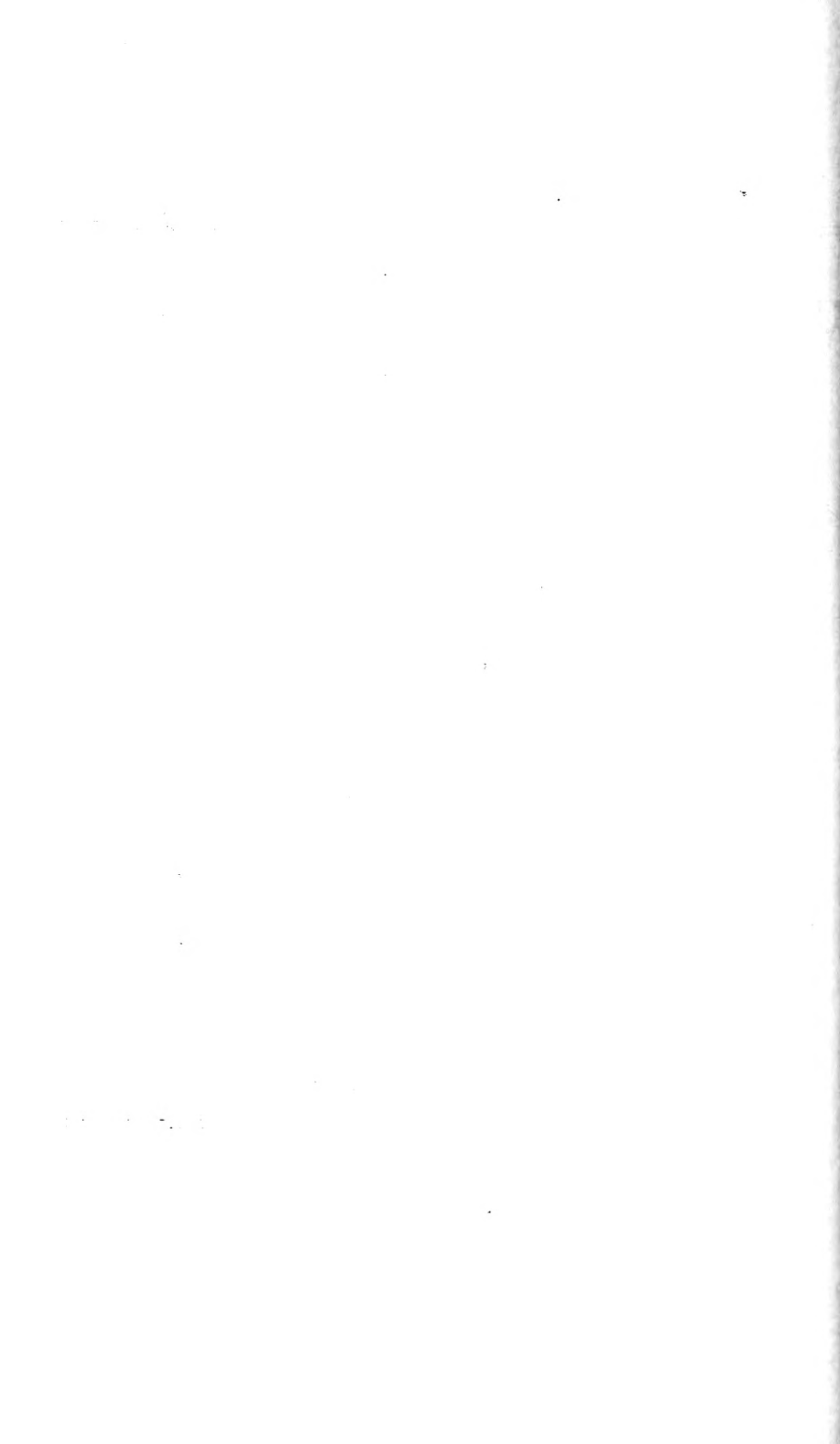
**APPELLANTS' REPLY BRIEF**

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# United States Court of Appeals For the Ninth Circuit

R. P. HILL and MARY HILL, *Appellants,*

vs.

A. E. WAXBERG, doing business as  
WAXBERG CONSTRUCTION COMPANY,  
*Appellee.*

No. 14982

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF  
ALASKA, FOURTH DIVISION

## APPELLANTS' REPLY BRIEF

### ARGUMENT

#### **The Evidence Was Insufficient to Establish a Case for the Jury.**

The respondent has largely ignored that portion of the respondent's testimony which explains his reason and purpose in devoting his time to the preliminary details of the construction project. The respondent's testimony establishes that he was not interested in just seeing that an FHA commitment was issued (Tr. 125, 144, 145, 146). He was interested in the issuance of a commitment, based upon plans and specifications, that would insure a profit for the building contractor. The respondent testified as follows (Tr. 126):

"That's right. That is the reason I spent all this time to see that we get a building the specifications and so forth that, so that I could make a reasonable profit."

This is understandable. Any contractor devotes certain time and effort to insure that if he undertakes a construction project he will make a profit. However, such activities are not for the benefit of the owner, but instead are primarily for the contractor's own benefit. Such is the case here.

The instructions given by the trial court do not present to the jury the issue of the respondent's intention in carrying out these activities. Even though the respondent's activities were intended primarily for his own benefit, under the court's instructions, if there was any resulting benefit to appellants, the jury was permitted to find against the appellants to the extent of such benefit. Appellants submit that this is not a correct interpretation of the law. See Annotation, Implied Agreement Repelled, 54 A.L.R. 548 and the decisions therein cited. Appellants' requested instructions would have properly submitted the issue of the respondent's intent to the jury.

The decisions of *Estate of Walton*, 213 Ia. 104, 238 N.W. 577 (1931) and *City Ice & Fuel Co. v. Bright*, 6 Cir. 1934, 73 F.(2d) 461, cited by respondent, state only that where services are performed for another, under circumstances where it should be known that compensation is expected, a promise to pay will be implied. The services performed here were rendered primarily for the respondent's own benefit and not "for another."

The appellants have no quarrel with the language quoted by the respondent from the decision of *Pierson v. Pierson*, 63 Ida. 1, 115 P.(2d) 742 (1941), stating that where one party renders it impossible for the other



to perform the contract the latter may recover in *quantum meruit* for services rendered up to the time of the breach. However, the theory set forth in this quotation was not submitted by the trial court to the jury. Instead the jury was instructed that if both parties were at fault the respondent was entitled to recover. See Willis on, Contracts (1937). §1482 and Restatement of Contracts (1932) §357, stating that recovery in *quantum meruit* would be denied where the plaintiff's breach of contract was wilful or deliberate.

#### **I. The Verdict of the Jury Was Excessive in Amount.**

The respondent has attempted to justify the amount of the jury verdict, and on page 7 of its brief, the respondent adds certain figures in this connection. The first figure is \$4300.00 and represents the respondent's testimony as to the "value" of his services. The respondent testified that he spent forty-three days on the project and that his services were valued at one hundred dollars per day (Tr. 58). It cannot be disputed that the great majority of the respondent's efforts were, according to his testimony, in connection with the preliminary work of obtaining the FHA commitment (Tr. 3, 94, 105, 112, 113, 119, 123). Yet the respondent has also included in his enumeration, mentioned above, the value of \$4800.00 assigned to the commitment by the only witness giving testimony on this point. The duplication is obvious.

The measure of damages under the trial court's instructions was the amount of benefit received by the appellants as a result of the respondent's services and expenditures. The respondent is not entitled to be compensated on a daily basis for his time and then add to

This is understandable. Any contractor devotes certain time and effort to insure that if he undertakes a construction project he will make a profit. However, such activities are not for the benefit of the owner, but instead are primarily for the contractor's own benefit. Such is the case here.

The instructions given by the trial court do not present to the jury the issue of the respondent's intention in carrying out these activities. Even though the respondent's activities were intended primarily for his own benefit, under the court's instructions, if there was any resulting benefit to appellants, the jury was permitted to find against the appellants to the extent of such benefit. Appellants submit that this is not a correct interpretation of the law. See Annotation, Implied Agreement Repelled, 54 A.L.R. 548 and the decisions therein cited. Appellants' requested instructions would have properly submitted the issue of the respondent's intent to the jury.

The decisions of *Estate of Walton*, 213 Ia. 104, 238 N.W. 577 (1931) and *City Ice & Fuel Co. v. Bright*, 6 Cir. 1934, 73 F.(2d) 461, cited by respondent, state only that where services are performed for another, under circumstances where it should be known that compensation is expected, a promise to pay will be implied. The services performed here were rendered primarily for the respondent's own benefit and not "for another."

The appellants have no quarrel with the language quoted by the respondent from the decision of *Pierson v. Pierson*, 63 Ida. 1, 115 P.(2d) 742 (1941), stating that where one party renders it impossible for the other

to perform the contract the latter may recover in *quantum meruit* for services rendered up to the time of the breach. However, the theory set forth in this quotation was not submitted by the trial court to the jury. Instead the jury was instructed that if both parties were at fault the respondent was entitled to recover. See Williston, Contracts (1937). §1482 and Restatement of Contracts (1932) §357, stating that recovery in *quantum meruit* would be denied where the plaintiff's breach of contract was wilful or deliberate.

## II. The Verdict of the Jury Was Excessive in Amount.

The respondent has attempted to justify the amount of the jury verdict, and on page 7 of its brief, the respondent adds certain figures in this connection. The first figure is \$4300.00 and represents the respondent's testimony as to the "value" of his services. The respondent testified that he spent forty-three days on the project and that his services were valued at one hundred dollars per day (Tr. 58). It cannot be disputed that the great majority of the respondent's efforts were, according to his testimony, in connection with the preliminary work of obtaining the FHA commitment (Tr. 73, 94, 105, 112, 113, 119, 123). Yet the respondent has also included in his enumeration, mentioned above, the value of \$4800.00 assigned to the commitment by the only witness giving testimony on this point. The duplication is obvious.

The measure of damages under the trial court's instructions was the amount of benefit received by the appellants as a result of the respondent's services and expenditures. The respondent is not entitled to be compensated on a daily basis for his time and then add to

that figure the net benefit or value resulting to the appellants from the time so spent.

The respondent had the burden of establishing the value of the benefit which the appellants received by reason of the respondent's activities and expenditures. If the respondent's estimate as to the value of his services is accepted, the benefit to the appellants would total \$4,300. The respondent failed to present evidence concerning the benefit or value to the appellant of the respondent's expenses, and consequently, he failed to sustain the burden of proof with respect to this item.

The respondent testified that he performed services preliminary in obtaining the FHA commitment (Tr. 50). He also testified that the appellant, Mr. Hill, worked to obtain the commitment (Tr. 59), and that the appellant hired a firm of architects to prepare the plans and specifications for submission with the application for the commitment (Tr. 46). However, even if the full value of the commitment were assumed to result from the respondent's efforts and expenditures, its value could not be added to the figure which the respondent gave as the value of his services. The verdict of the jury was clearly excessive in amount.

Respectfully submitted,

LANDON & AIKEN,  
Seattle, Washington

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Fairbanks, Alaska

*Attorneys for Appellants.*

No. 14983

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**United States  
Court of Appeals**  
for the Ninth Circuit

---

**THEODORE B. RUSSELL,**  
vs. **Appellant,**

**THE TEXAS COMPANY, a Corporation; FRED-  
ERICK T. MANNING DRILLING COM-  
PANY, a Corporation; and The Northern  
Pacific Railway Company, a Corporation,**  
**Appellees.**

**THE TEXAS COMPANY, a Corporation,**  
vs. **Appellant,**

**THEODORE B. RUSSELL,**  
**Appellee.**

---

**Supplemental  
Transcript of Record**

---

**Appeals from the United States District Court  
for the District of Montana.**

**FILED**  
**JUL -2 1956**



No. 14983

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**United States**  
**Court of Appeals**  
for the Ninth Circuit

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THEODORE B. RUSSELL,  
vs. Appellant,

THE TEXAS COMPANY, a Corporation; FRED-  
ERICK T. MANNING DRILLING COM-  
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**Supplemental**  
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**Appeals from the United States District Court**  
**for the District of Montana.**





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Company.



In the District Court of the United States for the  
District of Montana, Billings Division

No. 1448

THEODORE B. RUSSELL,

Plaintiff,

vs.

THE TEXAS COMPANY, a Corporation; FRED-  
ERICK T. MANNING DRILLING COM-  
PANY, a Corporation; and THE NORTHERN  
PACIFIC RAILWAY COMPANY, a Corpo-  
ration,

Defendants.

### REQUEST FOR ADMISSION OF FACTS

To: Ralph J. Anderson, Esq., 517 Power Block,  
Helena, Montana, Attorney for Plaintiff.

Please take notice that the defendants hereby request the plaintiff, pursuant to Rule 36 of the Federal Rules of Civil Procedure, to admit within 10 days after service of this request, for the purposes of the above-entitled action only, and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. A map of the general route over which the Northern Pacific Railroad Company proposed to construct its railroad through the Territory of Montana was filed in the office in Washington, D. C., of the Commissioner of the General Land Office of

the United States of America on February 21, 1872. On April 22, 1872, the said Commissioner transmitted to the Register and Receiver of the local land office at Helena, Montana, a map showing the said designated route of said railroad along with an order by direction of the Secretary of Interior of the United States of America directing said Register and Receiver to withhold from sale, location, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles on either side of said railroad as designated on said map. All of Section 23, Township 17 North, Range 53 East, M.P.M., was within a distance of 40 miles from said railroad as designated on said maps. On May 6, 1872, said Register and Receiver acknowledged receipt of said map and said order.

2. Thereafter the construction of that portion of said railroad was completed between Glendive Creek and the Tongue River in the Territory of Montana. A map showing the definite, fixed and completed location of said portion was filed in the office of the Commissioner of the General Land Office of the United States of America on June 25, 1881.

3. At all times since February 21, 1872, Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian has been, and now is, an alternate odd-numbered section located less than 40 miles from the general route proposed for said line of railroad through the Territory of Montana; and at all times on and after June 25, 1881, said

section of land has been, and now is, an alternate odd-numbered section located less than 40 miles from and adjacent to that portion of the definite, fixed and completed line of said railroad as it was constructed between Glendive Creek and the Tongue River in the Territory of Montana.

4. The United States of America surveyed the land through the Territory of Montana and the State of Montana located within 40 miles on either side of said definite, fixed and completed line of railroad and, on September 21, 1900, caused a plat of survey to be filed with the General Land Office of the United States of America, which included all of said Section 23 in Township 17 North of Range 53 East of the Montana Principal Meridian which showed the location of said section with respect to said completed line of railroad.

5. The Northern Pacific Railway Company, on September 22, 1900, filed in the local office of the General Land Office of the United States of America at Miles City, Montana, its Place List No. 36 in which it designated, along with other lands, all of Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, which list was thereafter on September 30, 1900, duly approved by the local land officers of said General Land Office. The said Place List No. 36, filed September 22, 1900, as aforesaid, and the approval of September 30, 1900, by the local land officers of the said General Land Office, except for the description of the lands designated therein, reads as follows, to wit:

“Land Department

“Northern Pacific Railway Company

“List No. 36 (Place)

“State of Montana

“U. S. Land Office at Miles City

“....., 19 ..

“Northern Pacific Railway Company, the successor of the Northern Pacific Railroad Company, under and by virtue of the Acts of Congress, entitled ‘An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget’s Sound, on the Pacific Coast, by the Northern Route,’ approved July 2, 1864, and ‘A resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road, and to secure the same by mortgage, and for other purposes,’ approved May 31, 1870, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office, hereby makes and files the following list of selections of public lands claimed by the said Northern Pacific Railway Company, as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, and the location of the line of route of the Northern Pacific Railroad, being for a section of ..... miles of the same, commencing at Little Missouri River and ending at Tongue River, the selections being particularly described as follows, to wit:



“(Description of lands designated.)

“State of Minnesota,

“County of Ramsey—ss.

“I, Wm. H. Phipps being duly sworn, depose and say, that I am the Land Commissioner of the Northern Pacific Railway Company; that the foregoing list of lands, which I hereby select, is a correct list of a portion of the public lands claimed by the said Northern Pacific Railway Company as enuring to said Company, to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route, for which a grant of lands was made by the act of Congress approved July 2, 1864, and the joint resolution approved May 31, 1870; that the said lands are vacant, unappropriated, and are not interdicted mineral or reserved lands, and are of the character contemplated by the grant, being within the limits of forty miles on each side of the line of route for a continuous distance of . . . . . miles, being a portion of the lands for a section of . . . . . miles of said railway, commencing at Little Missouri River and ending at Tongue River.

“[Seal]                      WM. H. PHIPPS.

“Sworn and subscribed before me this twentieth day of September, 1900.

“[Seal]            /s/ W. F. VON DEYN,

“Notary Public, Ramsey  
County, Minnesota.

“United States Land Office

“Miles City, Montana

“Sept. 30, 1900.

“We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant, by Act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railway Company by Wm. H. Phipps, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side; and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office.

“We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the Act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated November 7, 1879, addressed by the Commissioner of the General Land Office to Registers and Receivers of the United States Land Office; and that

the said Company have paid to the undersigned, the Receiver, the full sum of Eight Hundred and Sixty-four (\$864.00) Dollars, in full payment and discharge of said fees.

“S. GORDON,

“Register.

“JAS. M. RHOADES,

“Receiver.”

6. Each year since March 1, 1919, Dawson County, Montana, has levied and assessed against the Northern Pacific Railway Company a tax on said company's reserved right of entry into said Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, all of which taxes have been paid by said company.

You are further notified that in the event of your refusal to admit the foregoing facts, defendants will request the Court, pursuant to Rule 37 of the Federal Rules of Civil Procedure, for an order requiring plaintiff to pay the reasonable expenses incurred in obtaining and making such proof, including reasonable attorney's fees.

Dated this 5th day of February, 1953.

COLEMAN, JAMESON &  
LAMEY,

By CALE CROWLEY,  
Attorneys for Defendants.

Of counsel for Defendant Railway Company:

ROBERT P. DAVIDSON,  
M. L. COUNTRYMAN, JR.

Of counsel for Defendants, The Texas Company  
and Frederick T. Manning Drilling Company:

WALTER E. WILLS.

[Endorsed]: Filed February 19, 1953.

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[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR  
ADMISSIONS OF FACTS

To: Coleman, Jameson & Lamey, 516 Electric Building, Billings, Montana, Attorneys for Defendants.

Plaintiff hereby responds to the defendants' request for admissions of facts on file herein, made pursuant to Rule 36 of the Federal Rules of Civil Procedure, for the purposes of the above-entitled action only, and subject to all pertinent objections as to admissibility which may be interposed at the trial, as follows:

1. Admits that a map of the general route over which the Northern Pacific Railroad Company proposed to construct its railroad through the Territory of Montana was filed in the office in Washington, D. C., of the Commissioner of the General Land Office of the United States of America on

February 21, 1872. On April 22, 1872, the said Commissioner transmitted to the Register and Receiver of the local land office at Helena, Montana, a map showing the said designated route of said railroad along with an order by direction of the Secretary of Interior of the United States of America directing said Register and Receiver to withhold from sale, location, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles on either side of said railroad as designated on said map. All of Section 23, Township 17 North, Range 53 East, M.P.M., was within a distance of 40 miles from said railroad as designated on said maps. On May 6, 1872, said Register and Receiver acknowledged receipt of said map and said order.

2. Admits that thereafter the construction of that portion of said railroad was completed between Glendive Creek and the Tongue River in the Territory of Montana. A map showing the definite, fixed and completed location of said portion was filed in the office of the Commissioner of the General Land Office of the United States of America on June 25, 1881.

3. Admits that at all times since February 21, 1872, Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian has been, and now is an alternate odd-numbered section located less than 40 miles from the general route proposed for said line of railroad through the Territory of Montana; and at all times on and after June 25,

1881, said section of land has been, and now is, an alternate odd-numbered section located less than 40 miles from and adjacent to that portion of the definite, fixed and completed line of said railroad as it was constructed between Glendive Creek and the Tongue River in the Territory of Montana.

4. Admits that the United States of America surveyed the land through the Territory of Montana and the State of Montana located within 40 miles on either side of said definite, fixed and completed line of railroad and, on August 21, 1900, caused a plat of survey to be filed with the General Land Office of the United States of America, which included all of said Section 23 in Township 17 North of Range 53 East of the Montana Principal Meridian which showed the location of said section with respect to said completed line of railroad.

5. Admits that the Northern Pacific Railway Company, on September 22, 1900, filed in the local office of the General Land Office of the United States of America at Miles City, Montana, its Place List No. 36 in which it designated, along with other lands, all of Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, which list was thereafter on September 30, 1900, duly approved by the local land officers of said General Land Office. The said Place List No. 36, filed September 22, 1900, as aforesaid, and the approval of September 30, 1900, by the local land officers of the said General Land Office, except for the descrip-

tion of the lands designated therein, reads as set forth in said Request for Admissions.

6. Admits that each year since March 1, 1919, Dawson County, Montana, has levied and assessed against the Northern Pacific Railway Company a tax on said company's reserved right of entry into said Section 23, Township 17 North, Range 53 East of the Montana Principal Meridian, all of which taxes have been paid by said company.

Dated this 5th day of May, 1953.

RALPH J. ANDERSON,  
Attorney for Plaintiff.

[Endorsed]: Filed May 9, 1953.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD

United States of America,  
District of Montana—ss.

It appearing that the parties hereto, acting through their respective counsel of record, entered into a stipulation for a correction of the record on appeal by the filing of a supplemental record, pursuant to the authority of Rule 75 (h) of the Federal Rules of Civil Procedure, and that in response to said stipulation, Paul P. O'Brien, Clerk of the United States Court of Appeals of the Ninth Circuit, suggested to the parties hereto that they obtain

from me a supplemental record and send it to the said Clerk of the United States Court of Appeals for the Ninth Circuit for filing,

Now, Therefore, I, E. Warren Toole, Clerk of the United States District Court for the District of Montana, hereby certify and transmit to the United States Court of Appeals for the Ninth Circuit by way of a supplemental record on appeal, a full, true and correct transcript of those portions of the record in Case No. 1448 requested, and I do hereby certify and return to the Honorable United States Court of Appeals for the Ninth Circuit the foregoing transcript of the "Request for Admission of Facts" and of the "Response to Request for Admission of Facts" designated for the Supplemental Record on Appeal herein, as appears from the original records and files of said Court in my custody as such Clerk.

Witness my hand and the seal of said Court at Great Falls, Montana, this 2nd day of May, 1956.

[Seal]                      E. WARREN TOOLE,  
Clerk, United States District Court for the District  
of Montana.

By /s/ C. G. KEGEL,  
Deputy Clerk.



[Endorsed]: No. 14983. United States Court of Appeals for the Ninth Circuit. Theodore B. Russell, Appellant, vs. The Texas Company, a Corporation; Frederick T. Manning Drilling Company, a Corporation, and The Northern Pacific Railway Company, a Corporation, Appellees. The Texas Company, a Corporation, Appellant, vs. Theodore B. Russell, Appellee. Supplemental Transcript of Record. Appeals from the United States District Court for the District of Montana.

Filed May 7, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.



No. 14,983

# United States Court of Appeals

*for the Ninth Circuit*

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THEODORE B. RUSSELL,

*Appellant,*

*vs*

THE TEXAS COMPANY, a corporation,  
FREDERICK T. MANNING DRILLING COMPANY, a  
corporation, and

THE NORTHERN PACIFIC RAILWAY COMPANY, a  
corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

*vs*

THEODORE B. RUSSELL,

*Appellee.*

---

## Brief of Appellant

---

*Appeal from the United States District Court for the  
District of Montana*

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RALPH J. ANDERSON,

STANLEY P. SORENSON,

*Attorneys for Appellant,  
Theodore B. Russell*

THUNDER'S



HELENA

FILED

MAY 21 1956



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# United States Court of Appeals

*for the Ninth Circuit*

---

THEODORE B. RUSSELL,

*Appellant,*

*vs*

THE TEXAS COMPANY, a corporation,  
FREDERICK T. MANNING DRILLING COMPANY, a  
corporation, and

THE NORTHERN PACIFIC RAILWAY COMPANY, a  
corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

*vs*

THEODORE B. RUSSELL,

*Appellee.*

---

## Brief of Appellant

---

*Appeal from the United States District Court for the  
District of Montana*

---

### PRELIMINARY MATTERS

#### 1. JURISDICTION OF THE LOWER COURT AND OF THIS COURT

In compliance with the rules of this Court the appellant, Theodore B. Russell, presents the following statement showing the basis of the jurisdiction of the lower court and the basis of the jurisdiction of this Court to entertain this appeal.

This action was brought by the appellant, Theodore B. Russell, in the District Court of the United States for the District of Montana, Billings Division, wherein the action was Civil Action No. 1448. The lower court, having original jurisdiction of this cause by virtue of Section 1332, 28 U. S. C. A., which reads as follows:

"(a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000 exclusive of interest and costs, and is between:

"(1). Citizens of different States;

(2). Citizens of a State, and foreign states or citizens or subjects thereof;

(3). Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b). The word 'States' as used in this section includes the Territories and the District of Columbia. June 25, 1948, c. 646, 62 Stat. 930."

The action was brought for the purpose of having a purported mineral reservation of the Northern Pacific Railway Company on certain lands located in Montana adjudged void, for the purpose of having certain oil leases purportedly granted under the said reservation adjudged void and that the cloud created by the purported mineral reservation and the purported oil and gas lease be removed. In a second and third cause of action the plaintiff seeks judgment against the Texas Company for damages on account of the use by that company of his land, both in connection with drilling

operations thereon and in connection with the Texas Company's operations on adjoining lands. As to the first cause of action, it is alleged in paragraph 2 of the Complaint (R. 3-4) that the amount in controversy is more than the sum of \$3,000 exclusive of interest and costs. This allegation is admitted by defendant, The Texas Company (R. 17) and by defendant, Northern Pacific Railway Company (R. 37). The same allegation is made by the plaintiff with reference to the second cause of action (R. 10) and the third cause of action (R.12). The prayer of the Complaint seeks to have declared void and invalid the mineral reservation upon lands which are producing substantial quantities of oil. See plaintiff's exhibit No. 10, a certified copy of the records of the Oil and Gas Conservation Commission of the State of Montana. The prayer also seeks damages in the amount of \$100,000.00 and in the amount of \$150.00 per day from the 30th day of October, 1952, to and including the 2nd day of December, 1952 (R. 15-16). Unquestionably, the matter in controversy is in excess of the jurisdictional amount. See the following cases:

Gray v. Blight, C.C.A. Colo. 1940, 112 F. (2d) 696, certiorari denied 61 S. Ct. 170, 311 U.S. 704, 85 L. Ed. 457;

Wyoming Rep. Co. v. Herrington, C.C.A. Wyo. 1947, 163 F. (2d) 1004.

The plaintiff, Russell, in paragraph No. 1 of his Complaint (R. 3) alleges that he is a citizen and resident of the State of Iowa, that the defendant, The Texas Company, is a corporation created, organized and existing under and by

virtue of the laws of the State of Delaware, and that the defendant, Northern Pacific Railway Company, is a corporation created, organized and existing under and by virtue of the laws of the State of Wisconsin. These allegations are admitted by the defendant, The Texas Company (R. 12) and by the defendant, Northern Pacific Railway Company, (R. 37). The same allegations as to the citizenship and residence of the plaintiff and as to the state of incorporation of the defendant, The Texas Company, are found in the second and third causes of action (R. 10, 12) and are admitted by the defendant, The Texas Company (R. 33, 34). The defendant, Frederick T. Manning Drilling Company, is no longer in the case, the action having been dismissed as to this defendant, by stipulation of the parties (R. 109,110). It is, therefore, apparent that the requisite diversity of citizenship exists.

Defendant, Northern Pacific Railway Company filed a motion for summary judgment (R. 54). The defendant, The Texas Company, filed a motion for partial judgment (R. 52). These motions resulted in an order for partial summary judgment made and entered November 23, 1953 (R. 66) and partial summary judgment pursuant thereto, also entered December 3, 1953 (R. 69). An appeal was taken by the plaintiff, Theodore Russell, from the partial summary judgment, which appeal, No. 14,246, was dismissed by this Court as premature under Rule 54-B of the Federal Rules of Civil Procedure. See *Russell v. The Texas Company et al*, 211 F. (2d) 740. Subsequently, a trial was had on the 20th day of April, 1955 (R. 171) resulting in a final judgment

(R. 126) incorporating the previous partial summary judgment. Plaintiff's appeal from the partial summary judgment, entered on the 3rd day of December, 1953, and from the final judgment, excepting only that portion thereof by which it is ordered, adjudged and decreed that the defendant, The Texas Company, pay to the plaintiff the sum of \$3,-600.00 under a contract between the plaintiff and the defendant.

This Court's jurisdiction to hear and determine this appeal is based upon Section 1291, 28 U.S.C.A., which provides as follows:

"The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929."

Notice of appeal was filed within time (R. 132). The requisite bond on appeal has been filed (R. 133) and the appeal has since been prosecuted with diligence.

## 2. STATEMENT OF THE CASE

The land involved in this action is Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana.

This section was originally acquired by the defendant, Northern Pacific Railway Company under an Act of Con-

gress, approved July 2, 1864, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route," 13 Stat. at L. 365, Chap, 217, which was an act providing for the incorporation of the Northern Pacific Railroad Company, predecessor of the defendant Railway Company. By the terms of that Act, the pertinent portions of which are set forth in the appendix to this brief, no mortgage or construction bonds were to be issued, or any mortgage lien created on the grant except with the consent of Congress. By a Joint Resolution of Congress, approved May 31, 1870, 16 Stat. at L. 378, Congress authorized the Northern Pacific Railroad Company to issue bonds to aid in the construction and equipment of its road, said bonds to be secured by mortgages on all of its property, railroad, land grants, and franchise to be a corporation. The Joint Resolution granted further lands and contained a proviso to the effect that the granted lands, not sold or disposed of by the Railroad Company or subject to the mortgage authorized by the Joint Resolution, at the expiration of five years after the completion of the entire road, should be subject to settlement and preemption like other lands, at a price to be paid to the Railroad not exceeding Two Dollars and Fifty Cents (\$2.50) per acre. The Railroad Company took advantage of the provisions of the Joint Resolution and mortgaged the lands and selection rights granted by the Joint Resolution and by the Act of July 2, 1864. The Railroad Company defaulted in the payments to be made upon the bonds secured by the mortgages in a foreclosure action the

lands and rights of the Railroad Company were sold to the defendant Railway Company and the defendant Railway Company succeeded to all of the rights, privileges and obligations of the Railroad Company, under the Act of 1864 and the Joint Resolution of 1870.

In the year 1900, defendant, Railway Company made a selection of public lands enuring to it under the terms and provisions of the Act of Congress of 1864 and the Joint Resolution of 1870. The lands with which this action is concerned were included within that selection and were patented to the Railway Company in June of 1902. On the 30th day of November, 1909, the Railway Company contracted to sell the lands to one MaBelle Cobb for a consideration of Four Dollars and Fifty Cents (\$4.50) per acre. A certified copy of this contract is before this Court. The date of the contract was more than five years after the completion of the entire road of the Northern Pacific Railroad Company and its successor, the Northern Pacific Railway Company, and the lands had not been previously sold or disposed of by the Northern Pacific Railway Company and were not subject to the mortgage authorized by the Joint Resolution of 1870. Through various assignments one Millard Strubrud succeeded to the interest of MaBelle Cobb and in 1918 the Railway Company conveyed the land by warranty deed to Millard Strubrud. The plaintiff, Theodore Russell, is the successor in interest of Millard Strubrud.

The deed from the Railway Company to Strubrud contained an exception and reservation of all minerals of any

nature, including coal, iron, natural gas and oil, together with the use of so much of the surface as might be necessary for exploring for and mining or otherwise extracting and carrying away the minerals, with the obligation upon the grantor, its successors and assigns, to pay to the grantee, his heirs or assigns, the market value of such portions of the surface as may be used for such operations. This deed appears in the Transcript of Record on Page 59.

An Abstract of Title to the land was introduced in evidence and the original has been, by order of the court below, transmitted to this Court (R. 136). It should be noted that the above mentioned reservation does not appear at any point in the Abstract.

The defendant, The Texas Company, is the Lessee under an oil and gas lease from the defendant Railway Company, embracing these lands, and since on or about the late spring of the year 1952 the Texas Company has conducted extensive operations on the section involved and has used in connection with its operations on the section involved, 25.76 acres. (R. 114). The defendant, The Texas Company, has also made use of the surface of this section in connection with its operations upon other lands, which use the defendant admits was wrongful (R. 33, 35).

The foregoing facts are undisputed. The issues presented by this appeal are as follows:

- (1) Did the proviso of the Joint Resolution of Congress of 1870, relative to settlement and preemption, apply to the land here involved?



- (2) If so, is the reservation of mineral rights by the defendant Railway Company valid?

The foregoing issues concern both the defendant Railway Company and the defendant, The Texas Company. There are also certain issues which are raised by the second and third causes of action, which involve only the defendant, The Texas Company. These are:

- (1) The recovery to which the plaintiff is entitled by reason of the wrongful use by The Texas Company of the surface of Section 23, in connection with its operations upon other lands.
- (2) The amount of compensation to which the plaintiff is entitled by reason of the use of the surface of Section 23.

The lower court found the reservation valid (R. 113, 66, 69, 126); found the plaintiff entitled to the sum of \$3,600 by reason of the wrongful use of the surface of Section 23, in connection with operations upon other lands under a revocable license, at the rate of \$150.00 per day for such use (R. 119) and found the plaintiff entitled to recover \$10.00 an acre for the lands in Section 23, used by the defendant, The Texas Company, a total of Two Hundred Thirty-seven Dollars and Sixty Cents (\$237.60) (R. 114, 119). The court further found and concluded that the evidence was insufficient for the court to determine the damages resulting to the plaintiff for the wrongful use of Section 23, during the period not covered by the revocable license (R. 119).

## SPECIFICATIONS OF ERROR

(1) The Court erred as a matter of law in ordering, in its Order entered November 23, 1953, that summary judgment be entered in favor of the defendant, Northern Pacific Railway Company (R. 66).

(2) The Court erred as a matter of law in ordering, in its Order of November 23, 1953, that at all times referred to in the pleadings, the defendants, The Texas Company and Frederick T. Manning Drilling Company, were and now are authorized and entitled to enter upon the lands described in the Complaint, as Lessees of the defendant, Northern Pacific Railway Company, and to the use of such of the surface of said lands as was or is necessary for exploring for and mining, or otherwise extracting or carrying away, all minerals of any nature whatsoever, including coal, iron, natural gas, and oil, upon or in said lands, and that plaintiff is not entitled to an injunction or order restraining defendants from such use. (R. 67).

(3) The Court erred as a matter of law in ordering, in its Order entered November 23, 1953, that the only issue of fact between the plaintiff and the defendants, The Texas Company and Frederick T. Manning Drilling Company, is the compensation to which the plaintiff is entitled for its use of plaintiff's land (R. 68).

(4) The Court erred in entering its Summary Judgment in favor of the defendant, Northern Pacific Railway Company. (R. 69).

(5) The Court erred in its Findings of Fact, filed October 6, 1955, in arriving at its Findings of Fact No. III, as follows, to-wit:

"Defendant Northern Pacific Railway Company, as successor in interest to the Northern Pacific Railroad Company, acquired fee title to Section 23 under the land grant act of July 2, 1864, C 217, 13. Stat. 365." (R. 112).

The said Findings being contrary to the evidence and against the law.

(6) The Court erred in arriving at its Findings of Fact No. IV, as follows, to-wit:

"On June 14, 1918, defendant Northern Pacific Railway Company as grantor conveyed Section 23 to the predecessors in interest of the plaintiff, the conveyance containing the following mineral exception and reservation:

" 'Excepting and reserving to the grantor, its successors and assigns, forever, all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said lands, together with the use of such surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same but the grantor, its successors and assigns, shall pay to the grantee, or his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; \* \* \*'

"At all times since, the defendant Northern Pacific Railway Company has been, and now is, the owner in fee of all minerals upon, in or under Section 23, to-

gether with the right to use such of the surface as may be necessary for the purpose of exploring for, or mining or extracting said minerals; obligated, however, to pay to the owner of the remainder of the surface rights the market value as of the time any mining operations commenced of such portion of the surface taken for such mining purpose." (R. 112, 113).

The said Findings being contrary to the evidence and against the law.

(7) The Court erred in arriving at its Findings of Fact No. V, as follows, to-wit:

"That at all times since June 14, 1944, plaintiff Theodore B. Russell has been, and now is the owner of all surface rights in Section 23 other than those excepted and reserved by the defendant Northern Pacific Railway Company." (R. 113).

The said Findings being contrary to the evidence and against the law.

(8) The Court erred in arriving at its Findings of Fact No. IX, as follows, to-wit:

"That the most valuable use available to the plaintiff for Section 23 as of March 14, 1952, was the use for grazing purposes." (R. 114).

The said Findings being contrary to the evidence and against the law.

(9) The Court erred in arriving at its Findings of Fact No. X, as follows, to-wit:

"That the market value of Section 23 to the plaintiff March 14, 1952, was \$10.00 per acre. The rental value of the section was \$100.00 per year. (R. 114).

The said Finding being contrary to the evidence and against the law.

(10) The Court erred in arriving at its Findings of Fact No. XVI, as follows, to-wit:

"That all of the rock used by defendant from plaintiff's lands, both in connection with its operations thereon and in connection with its operations on adjacent lands, was taken from the 23.76 acres of plaintiff's land referred to in Finding No. XI of these Findings of Fact, for which the plaintiff will be compensated by the payment to him of the market value of said 23.76 acres at the time defendant commenced its operations on his said lands, as provided in said mineral reservation; that there was not sufficient competent evidence from which the Court can find the reasonable market value of the use of the roads across plaintiff's lands in connection with defendant's operations on adjacent lands for the period in which said roads were so used not covered by the revocable license referred to in Finding No. XIV of these Findings of Fact; with regard to water from plaintiff's lands used by defendant on adjoining lands, there is no evidence from which the Court can determine the amount of such water which was so used during the period of the revocable license referred to in Finding No. XIV, and the amounts of such water so used during the period not covered by said license; and with regard to all the water used by defendant, both on and off of plaintiff's land, there is not sufficient evidence from which the Court can determine the reasonable market value of said water." (R. 117).

The said Finding being contrary to the evidence and against the law.

(11) The Court erred in arriving at its Conclusion of Law No. II, as follows, to-wit:

“That the Northern Pacific Railway Company is the owner in fee of all minerals upon, in or under Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana, together with the use of such of the surface as may be necessary for exploring, for and mining or otherwise extracting and carrying away the same.” (R. 118).

The said Conclusion being contrary to the law.

(12) The Court erred in arriving at its Conclusion of Law No. III, as follows, to-wit:

“That plaintiff Theodore B. Russell is the owner of the surface of said land subject to the rights reserved to the Northern Pacific Railway Company.” (R. 118).

The said Conclusion being contrary to the law.

(13) The Court erred in arriving at its Conclusion of Law No. IV, as follows, to-wit:

“That the defendant The Texas Company was lawfully authorized on March 14, 1952, to enter upon Section 23, as lessee of the Northern Pacific Railway Company and at all times since has been and now is authorized to use such of the surface of Section 23 as is necessary to conduct mining operations thereon, obligated, however, to pay to plaintiff Theodore B. Russell the market value as of March 14, 1952, of such of the surface of Section 23 as it has taken for such mining op-

erations, or may in the future take for such mining operations. That as of the date of this trial the defendant The Texas Company owes plaintiff Theodore B. Russell the sum of \$237.60, being the reasonable market value as of March 14, 1952, the date upon which the surface of Section 23, used by said defendant in connection with its mining operations on said Section." (R. 118, 119).

The said Conclusion being contrary to the evidence and the law.

(14) The Court erred in arriving at its Conclusion of Law No. VI, as follows, to-wit:

"That for the wrongful use of said Section 23 and the rock and water therefrom, during the period not covered by said revocable license agreement heretofore referred to, the evidence is insufficient for the Court to find the reasonable value of such use." (R. 119, 120).

The said Conclusion being contrary to the evidence and the law.

(15) The Court erred in arriving at its Conclusion of Law No. VII, as follows, to-wit:

"That plaintiff is entitled to judgment in the total sum of \$3,837.60, together with his costs." (R. 120).

The said Conclusion being contrary to the evidence and the law.

(16) The Court erred in arriving at its Conclusion of Law No. VIII, as follows, to-wit:

"That plaintiff is not entitled to an injunction against defendant." (R. 120).

The said Conclusion being contrary to the evidence and the law.

(17) The Court erred in ordering the entry of judgment, based upon the said Findings of Fact and Conclusions of Law. (R. 120).

(18) The Court erred in ordering, adjudging and decreeing in its judgment entered October 13, 1955, that Summary Judgment be entered in favor of the defendant, Northern Pacific Railway Company and against the plaintiff with costs. That the defendant, Northern Pacific Railway Company has been and now is the owner in fee of all minerals upon, in or under Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana, together with the right to use such of the surface of said lands as may be necessary for the purpose of exploring for or mining or extracting certain minerals. (R. 127, 128).

(19) The Court erred in adjudging and decreeing in its Judgment and Decree, entered the 13th day of October, 1955, that the defendant, The Texas Company, at all of the times mentioned in the pleadings, had and now has the right to enter upon the land described in the Complaint, as Lessee of the defendant Northern Pacific Railway Company, and to the use of such of the surface of certain lands as was or is necessary for exploring for and mining or otherwise extracting and carrying away all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said lands and that the plaintiff is not entitled to an injunction against either the defendant Northern Pacific Railway Company or the defendant The Texas Company. (R. 128).



(20) The Court erred in adjudging and decreeing in its Judgment and Decree entered October 13, 1955, that the defendant The Texas Company pay to the plaintiff the sum of \$237.60, for the reasonable market value of that portion of said lands used by the defendant, The Texas Company, in its mining operations. (R. 128).

(21) The Court erred in failing to adopt as its Findings of Fact and Conclusions of Law the plaintiff's proposed Findings of Fact and Conclusions of Law. (R. 95-102).

## ARGUMENT

I. *The Summary Judgment in Favor of the Defendant Northern Pacific Railway Company and Partial Summary Judgment in Favor of the Defendant The Texas Company.*

(a) *Procedure and Power of the Court and Burden Relative to Motions for Summary Judgments.*

At the outset we present the following authorities illustrating the proper procedure, the power of the court and the burden upon the movant in considering the motion for Summary Judgment:

Fairbanks, Morse & Co. v. Consolidated Fisheries Co.,  
190 F. (2d) 817, 824

"The law is clear that one who moves for a summary judgment has the burden of demonstrating that there is no genuine issue of fact."

Landy v. Silverman, 189 Fed (2d) 80, 82

"That one reasonably may surmise that the plaintiff is unlikely to prevail upon a trial, is not a sufficient basis for refusing him his day in court with respect to

issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them." Quoting from *Sprague v. Vogt*, 8 Cir. 150 F. (2d) 795, 801

*Ford v. Luria Steel & Trading Corp.*, 192 F. (2d) 880, 882

"It has become settled law that a genuine issue as to a material fact cannot be tried and determined upon affidavits, and that it must conclusively be shown that there is no such issue in the case and that the moving party is entitled to judgment as a matter of law, before summary judgment can lawfully be entered."

*Snyder v. Dravo Corporation*, 6 F.R.D. 546, 549

"All doubts as to the existence of a genuine or substantial issue as to a material fact must be resolved against the party moving for summary judgment, and the existence of a genuine or substantial dispute as to a material fact forecloses or bars summary judgment."

*Thomas v. Martin*, 8 F.R.D. 638

"If there be a substantial issue raised by the pleadings as distinguished from formal issues raised thereby, a motion for summary judgment cannot be sustained even though affidavits be submitted in denial of the substantial issues. The point to be determined on such motion is whether there is a real issue existing and in doing this all doubts are resolved against the movant."

*St. Louis Fire & Marine Ins. Co. v. Witney*, 96 F. Sup. 555 holds that all doubts must be resolved against movant.

*United States v. Haynes School Dist. No. 8*, 102 F. Supp. 843, 848

"Before a motion for summary judgment may be properly granted, it must clearly appear that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56 (c). The moving party has the burden of showing the absence of such an issue, and any reasonable doubt in that connection must be resolved in favor of the party resisting the motion, and facts asserted by such party must be taken as true."

(b) *Validity of the Mineral Reservation and the  
Leases Granted Thereunder*

The appellant's position in this aspect of the case may be outlined or summarized as follows:

1. The Granting Act of 1864, Chap. 217, 13 Stat. L., 365, the pertinent portions of which are set forth at pages 52 through 56 in the appendix to this Brief, provided for a grant to the Northern Pacific Railroad Company, predecessor of the defendant Railway Company, of every odd-numbered section in a belt ten (10) miles wide on each side of the right-of-way through states, and twenty (20) miles wide on each side of the right-of-way through territories. The lands contained in these belts were known as place lands. The Act also provided for another belt ten (10) miles in width on each side of the place land belt, from which the Railroad Company might select odd-numbered sections to replace sections lost to the place land grant by reason of prior preemption, mineral character, etc. These lands were known as the indemnity lands. The land involved

in this case is place land. The Granting Act of 1864 was a grant in praesenti, but the Railroad Company did not acquire title to the land by the Granting Act alone, and the Granting Act did not provide for the acquisition by the Railroad Company of a complete title. One of the incidents of an absolute fee—the power to mortgage, was withheld.

2. The Joint Resolution of 1870, Resolution 67,16 Stat. at L., 378, the pertinent portions of which are set forth at pages 56 through 58 in the appendix to this Brief, made a further grant to the Railroad Company, provided for yet another indemnity belt and provided for a new and increased title to the place lands of the 1864 Grant by removing the limitation upon the fee to be required by the Railroad Company contained in the Grant of 1864. The Railroad Company took advantage of the Resolution of 1870 by mortgaging the lands and selection rights received by and under the Grant of 1864.

3. By accepting the Joint Resolution of 1870, as it applied to the lands granted by the Act of 1864, the Railroad Company created a contract between itself and the United States for the benefit of third parties, by which it bound itself to dispose of the granted lands as provided in the Resolution of 1870.

4. The Granting Acts were and are laws as well as contracts and the purported mineral reservation of the defendant Railway Company is against the law, as well as being contrary to the contract.

5. The Railroad Company, by accepting the Resolution of 1870, bound itself to sell the lands without reservation and that which ought to have been done is to be regarded as done in favor of him to whom and against him from whom performanace is due.

6. The defendant Railway Company, acquiring the interests of the Railroad Company upon foreclosure of the mortgages made pursuant to the Joint Resolution of 1870, succeeded to the obligations as well as to the privileges of the Railroad Company and upon selection by the defendant Railway Company of the land here involved, it received title to that land subject to the same conditions as were applicable to the Railroad Company.

7. The reservations being illegal are void and the contract and deed by which the Railway Company parted with title to the land here in question, have the same effect as if there had been no such reservation contained therein. Consequently, the mineral interests passed to the plaintiff's predecessors by virtue of the contract and deed.

There is a further question raised by the manner in which the mortgage placed upon the lands and rights of the Railroad Company was foreclosed. This question will be considered separately.

1. *Nature and Effective Date of the Original Grant of July 2, 1864*

As stated in the outline above set forth, the Grant under the Act of July 2, 1864, 13 Stat. L. 365, was what is commonly referred to in the cases as a "grant in praesenti." The

grant was a grant in praesenti, but it was a conditional and limited grant. The grant vested title in the Railroad Company, but on the condition that the Railroad Company perform certain obligations, as provided in the Granting Act. In *St. Paul & Pacific R. Co. v. N. P. R. Co.*, 11 S. Ct. 389, 139 U. S. 1, 35 L. Ed., 77, the Supreme Court of the United States in discussing the nature of the title acquired by the Railroad Company, said:

“Although the restraint in the Act against the sale or alienation of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that the Company, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each 25-mile section was completed and accepted by the President, so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the Company’s failure to comply with its conditions.”

The condition concerning which the Supreme Court was speaking, is relatively unimportant in this action, but it serves to illustrate the nature of the title acquired by the Railroad Company.

The Act did not of itself invest the Railroad Company with title to any specific land. In other words, the lands were not conveyed by the Act alone. In *St. Paul & Pacific R. Co. v. N. P. R. Co.*, *Supra*, 11 S. Ct. 389, 139 U.S. 1,

35 L. Ed. 77, the Supreme Court, at another point in the opinion, had this to say:

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as are specifically reserved. It is in this sense that the grant is termed one in praesenti;  
\* \* \*."

The limitation upon the grant of which we spoke above, and which is of importance in this action, was the restraint placed upon the company's right of alienation by the provisions forbidding the mortgaging or creation of a lien contained in the Granting Act of 1864. (See Appendix page 56). This restraint was clear and explicit and it constituted a clear limitation upon the title granted, the power to mortgage being, of course, an incident of an absolute fee the grant, lacking this incident of an absolute fee, was clearly a limited grant.

2. *The Joint Resolution of 1870 Constituted a  
Grant of New Title to the "Place Lands"  
in Montana*

We have demonstrated that the grant of 1864 was a limited grant. The title which the Railroad Company could acquire under that grant was limited, for it could not mortgage, or in any way create a lien upon the land granted by the Act. The Joint Resolution of 1870 then gave the Railroad Company permission to mortgage.

(See page 56 of the appendix). It was in effect a re-grant of the same land, for it enlarged the Railroad Company's title to the land and granted to it a title to the land granted by the Act of 1864, which it had not theretofore enjoyed. This re-grant or new grant, as to the 1864 land, could have been accepted or rejected by the Railroad Company merely by mortgaging or not mortgaging the land. The Railroad Company accepted the new title granted and mortgaged the land, but Congress placed a condition upon this new grant, and that condition was the proviso regarding preemption and settlement. In the Resolution they granted new land and in addition they said—You may have a better title to the land already granted, but if you take advantage of this grant then "all lands hereby granted \* \* \* which shall not be sold or disposed of or remain subject to the mortgage by this Act authorized, at the expiration of five (5) years after the completion of the entire road, shall be subject to settlement and preemption, like other lands, at a price to be paid to said company, not exceeding \$2.50 per acre." (See page \_\_\_\_ of appendix). Having taken advantage of the Resolution and having accepted the more complete title offered, the Railroad Company was obligated to accept this burden as well. They must take the bitter with the sweet.

That the Northern Pacific Railway Company, when it succeeded to the rights of the Railroad Company, succeeded also to its burdens is settled. The Railway Company itself apparently recognized that fact. In its Place List No. 36, which was submitted to the District Court in opposition to the Motion for Summary Judgment, and which is before this Court, hav-



ing by order of the lower court been transmitted to this Court in the form introduced in the lower court (R. 136), the defendant Railway Company recited:

"NORTHERN PACIFIC RAILWAY COMPANY, the successors of the NORTHERN PACIFIC RAILROAD COMPANY under and by virtue of the Acts of Congress entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route,' approved July 2, 1864, and 'A Resolution authorizing the Northern Pacific Railroad Company to issue its bonds for the construction of its road and to secure the same by mortgage, and for other purposes,' approved May 31, 1870, and under and in pursuance of the Rules and Regulations prescribed by the Commissioner of the General Land Office; hereby makes and files the following list of selections of public lands claimed by the said Northern Pacific Railway Company, as enuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said Act of Congress, \* \* \*."

The Northern Pacific Railway Company and the Land Office apparently believed the Railway Company to be the successor of the Railroad Company to the rights granted and the obligations imposed by the Act of 1864 and the Resolution of 1870, and clearly they were correct in so considering. The Railway Company became the owner and operator of the railroad. It became entitled to and exercised the rights of the Railroad Company under the Act and the Resolution and it assumed the obligations of the Railroad Company.

The Supreme Court of the United States likewise has rec-

ognized that the Railway Company is bound by the obligations imposed upon the Railroad Company in the Act of 1864 and the Resolution of 1870. In *United States v. Northern Pacific Railway Company*, 61 S. Ct. 264, 311 U.S. 317, 84 L. Ed. 210, the court said:

"A majority of the Justices who heard this case are of the opinion that the proviso of the Resolution of 1870 required the company to open the lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire line in 1887, whether the lands were then subject to the mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it or advantage to the company, which resulted from this breach of contract."

Five years after the completion of the railroad was 1902, the mortgage foreclosure and sale thereunder to the defendant, Railway Company, took place immediately thereafter in 1903.

The Congress of the United States also apparently agrees with the proposition that the Railway Company succeeded to the rights of the Railroad Company and to its obligations, for in the Act enacted in 1929 providing for the bringing of the action resulting in the opinion last above cited, it said:

"\* \* \* and the passage of this Chapter shall not be construed as in anywise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31,

1870, relative to the disposition of granted lands by said grantee, and the right is hereby reserved to the United States to, at any time, enact further legislation relating thereto." 43 U.S.C.A. 923

On the basis of the foregoing arguments and authorities, we submit that the proviso of the Joint Resolution of 1870 applies to the lands acquired by the Railway Company under the Grant of 1864.

3. *By Virtue of the Proviso of the Joint Resolution of 1870, the Purported Mineral Reservation of the Northern Pacific Railway Company Is Void.*

That the proviso of the Joint Resolution created a contract between the company and the United States, enforceable by the parties to be benefited, namely, those desiring to purchase lands granted to the company, can be demonstrated by comparison with the grant considered in the case of *Ore. & Cal. R.R. v. U.S.*, 238, U.S. 393, 35 S. Ct. 908, 59 L. Ed. 1360. The proviso in the Granting Act there involved, read as follows:

"That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding Two Dollars and Fifty Cents per acre;"

In that case the United States Supreme Court held that the above quoted proviso was not a mandate to sell, but a limitation on the power to sell. The Court said:

"There could not be an absolute right to settle or purchase unless there was an absolute compulsion to sell."

The Supreme Court was clearly correct as to the proviso involved in the case last above cited. The words "to actual settlers only" are words of limitation not of direction. The proviso in this case on the other hand, required that the lands be opened to settlement and preemption, which requirement was recognized by the Supreme Court of the United States in *U.S. v. N.P.Ry. Co.*, *Supra*, 311 U.S., 317. See in particular the quotation from that case, set forth *supra*, at page 26. How can it be said that the lands are open to settlement and preemption if the company could refuse to sell to a person seeking to purchase under that proviso? Clearly the proviso in the Resolution of 1870 was a mandate to sell, provided, of course, that there should be a purchaser. This being the case, there was created a contract for the benefit of a class of third persons, and under the majority American rule, such a contract can be enforced by a third person who is a member of the class to be benefited. 12 Am. Jur. Contracts, Sections 277, 287, Pages 825, 840. This proviso is made with the clear intent and purpose to benefit the persons purchasing from the Railway Company. The country benefits only as the people are benefited, and it is clearly the purchaser who receives or should have received the benefit of the proviso.

Actually, enforcement of the contract is involved only incidentally. The Railroad Company, when it mortgaged the property, accepted the Joint Resolution and the proviso

therein contained, and agreed to sell the land as therein provided. The defendant Railway Company succeeded to this obligation as well as to the rights of the Railroad Company. Plaintiff now seeks the equitable remedy of the removal of the cloud cast upon his title by the purported mineral reservation. By virtue of the proviso, the conveyance from the Railway Company to the Plaintiff's predecessor, should have included the minerals. The maxim "that which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due" (Section 49-121, Revised Codes of Montana, 1947) operates upon this transaction and the conveyance should be considered as including the minerals, even though it contains a purported reservation, for the defendant Railway Company, bound itself to convey the minerals with the land. See *Krutzfeld v. Stevenson, et al*, 86 Mont. 463, 284 Pac., 553, wherein it was held that where a vendor executed a deed to an interest in oil lands and received an adequate consideration therefor, he could not come into a court of equity to evade his obligation on the ground that the deed did not convey what he had agreed to convey, but the court would consider as done that which should have been done and sustain the transaction. In this case the defendant Railway Company cannot escape its obligation upon the ground that the deed does not convey what it had bound itself to convey by the acceptance of the Joint Resolution of 1870.

The defendant Railway Company may argue that even under the proviso it had the power to reserve the minerals. That contention was answered in *Ore. & C.R. Co. v. U.S.*,

243 U.S. 549, 61 L. Ed. 890, wherein the Supreme Court said:

"An immediate and sufficient answer to the contention would seem to be that the grant was not absolute, but was qualified by a condition in favor of settlers, and if the 'lands' granted had such incidents, the 'lands' directed to be sold to actual settlers were intended to have such incidents. That is, if the 'lands' granted carried by necessary implication all that was above the surface and all below the surface, to the Railroad Company, they carried such implication to the actual settler. In other words, what 'lands' meant to the Railroad Company they meant to the settler, embraced within his right to purchase and acquire." 243 U.S. 552, 553.

Under the above authority, it clear that when the Railway Company sold the land it was required by the proviso to sell it without reservation.

The Railway Company may advance arguments based upon estoppel, laches or Statutes of Limitations, being their arguments under the doctrines of estoppel, upon the fact that the plaintiff herein traces his title to the original grantee from the Railroad Company. In *Ore. & C. R. Co. v. U.S.*, *Supra*, 238 U.S. 393, we find the following statement:

"We may observe that the Acts of Congress are laws as well as grants, and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the Railroad Company based on waiver, acquiescence and estoppel and even to the defenses of laches and the Statute of Limitations."

The above quotation also demonstrates that the reservation in this case is not only void as against the contract, but that it was void at its inception as against the law. In *Lowery v. Garfield County*, 122 Mont. 571, 208 Pac. (2d) 478, the Supreme Court of Montana said:

"A void thing is no thing; it has no legal effect whatsoever and no right can be obtained under it or grow out of it."

If the reservation was void at its inception, as against the contract and against the law, is it any less void now? We submit that it is not.

### *(c) The Mortgage Foreclosure Proceedings*

The Joint Resolution of 1870 provided certain specific steps by which the mortgage authorized by the Joint Resolution was to be foreclosed, if the occasion for foreclosure arose. It provided in part as follows:

"\* \* \* and if the mortgage hereby authorized shall, at any time be enforced by the foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustee to whom such mortgage may be executed, either at its maturity or for any failure or default of said company, under the terms hereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

The fact that not one acre of land was sold at the foreclosure sale to any purchaser other than the defendant Rail-

way Company, is strong indication that the provisions of the Joint Resolution set forth above were not observed. Aside from that fact, the Special Master's report of the sale, filed in the office of the United States Circuit Court at Helena, Montana, on August 1, 1896, a copy of which is before this Court, reveals conclusively that the provisions of the Resolution were not complied with. It reveals that lands located in North Dakota were sold in Montana in violation of the provisions that they should be sold in the state where they were situated. It reveals that the lands and rights of the Railroad Company were sold in bulk to the Railway Company in violation of the provision that the land should be sold in single sections or subdivisions thereof. Here we might also point out a strange fact was revealed by the Special Master's report, that the Northern Pacific Railway Company was somehow enabled to purchase all these lands and rights for the insignificant sum of \$500,000, a very small fraction of their true value.

In 37 Am. Jur., Mortgages, Sec. 786, p. 191, we find the following statement:

"As a general rule, if one who purchases property under an invalid mortgage foreclosure sale takes possession of the mortgaged property with the acquiescence of the mortgagor, he becomes a mortgagee in possession, entitled to the rights and chargeable with the liabilities, of a person in that capacity."

And in 37 Am. Jur., Mortgages, Sec. 804, p. 200, it is said:

"As a rule, a purchaser at an invalid mortgage foreclosure sale stands in the position of a mortgagee and



may prosecute another foreclosure proceeding, or, if the sale is thereafter set aside, he may have the original mortgage foreclosed on his behalf."

Under the void foreclosure sale the defendant Railway Company became, in effect, an assignee of the mortgagee, entitled to its rights and chargeable with its duties. It could enforce a foreclosure of the mortgage and sell the property but it could not reserve the minerals for there was no such right in the mortgagee. The sale of one section to Stubrud must, therefore, have been pursuant to this power and for that reason the purported reservation of minerals, which the Railway Company had no right to make, must be void and the minerals passed with the conveyance of the surface.

Upon reason and authority it is respectfully submitted that the Complaint in this action states a cause of action and that the defendants were not entitled to the Summary Judgments which were granted. The author is confident that This Honorable Court will not readily perpetuate the pernicious monopoly created by the defendant Railway Company's consistent refusal to abide by the provisions of laws passed for the protection of the public and the greater good of the country.

## *II. Judgment on the Second and Third Causes of Action*

In connection with the Judgment of the court, on the second and third causes of action contained in the plaintiff's Complaint, the contentions of the plaintiff may be summarized as follows:

- (1) The court adopted an incorrect valuation for the lands taken by The Texas Company, in connection with its operations upon Section 23.
  - (2) That the court was incorrect in determining that there was not sufficient evidence from which the court could determine the recovery to which plaintiff was entitled by reason of the wrongful use of Section 23, and the rock and water therefrom in connection with defendant, The Texas Company's operations upon other lands, during the period not covered by the Revocable License. The damages to which plaintiff would be entitled if the reservation is void, being a matter of fact, which, by reason of the Summary Judgments, was not explored, we will not consider that aspect of the case.
- (a) *Admittedly Wrongful Use of Plaintiff's Property and Revocable License to Continue Such Use.*

In the Complaint it is alleged, in the third cause of action therein, that the defendant The Texas Company, constructed and used road ways across the lands of the plaintiff herein, as a means of access to other lands; that the defendant The Texas Company, removed water from the lands of the plaintiff for use upon other lands; and that the defendant The Texas Company, has taken rock from the lands of the plaintiff, which rock was used in the construction of the roads for access to other lands. (R. 13-15). It is further alleged that these actions were wrongful and a trespass upon the lands of the plaintiff. It is alleged that on or about the 30th day of October, 1952, the plaintiff demanded of the de-

defendant The Texas Company, that it cease its use of the lands of the plaintiff in connection with its operations upon other lands, and that at the same time plaintiff offered to the defendant The Texas Company, a Revocable License to continue such use for a consideration of \$150.00 per day, to be paid to the plaintiff, and informed the defendant that the continued use would be taken as an acceptance of the offer. It is alleged on information and belief, that the defendant The Texas Company, continued to use the road ways, water and rock, to and including the 2nd day of December, 1952, and in its answer (R. 34-36), the defendant The Texas Company, admits that the road ways were used as a means of access to other lands; admits that rock from the plaintiff's lands was used in the construction of roads for adjacent lands; and admits that the use of said roads, water and rock for use upon adjacent lands was wrongful. Defendant The Texas Company also admits the demand and offer previously referred to. Plaintiff herein does not appeal from that portion of the Judgment by which the lower court found the existence of the Revocable License and awarded to the plaintiff the sum of \$3,600.00 thereunder, but defendant The Texas Company, cross-appeals from that portion of the Judgment. (R. 129). Consequently, we shall present some discussion of the matter of the Revocable License.

By its admissions of December 11, 1953 (Plaintiff's Exhibit 5) defendant The Texas Company, admitted receipt by Frederick T. Manning Drilling Company of the original, and by defendant The Texas Company, a copy of the letter

of October 28, a copy of which letter is attached to the admissions, and in which letter we find the following offer:

"Mr. Theodore B. Russell is willing to permit you a Revocable License to continue the use to the extent that the same has existed over the past period upon your payment to him of the sum of \$150.00 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the road way, water and/or materials will constitute your acceptance of this revocable permit."

The use referred to is set forth in the first paragraph of the letter as follows:

"Mr. Theodore B. Russell has called our attention to the fact that in your operations on Sections 22 and 29, Township 17 North, Range 53 East, Dawson County, Montana, you are using road ways across his Section 23, Township 17 North, Range 53 East, Dawson County. He advises further, that in your operations on Section 22 you are diverting water from his Section 23. Further, in your operations on Section 22, you are utilizing materials taken from Mr. Russell's Section 23."

By letter dated November 3, 1952, receipt of which was also admitted, the reference to Section 29 in the letter of October 28, is corrected to read Section 26 and compliance with the letter of October 28th is again requested. By its answer, dated April 13, 1955 (Plaintiff's Exhibit 9) to interrogatories submitted to them by the plaintiff, The Texas Company admits that it used the road ways on the plaintiff's Section 23 for access to other lands until and including the 22nd day of November, 1952. By its admission of De-

ember 11, 1953 (Plaintiff's Exhibit 5) The Texas Company admits that no answer was made to the letter of October 28, 1952 until after December 8, 1952. The Texas Company admits that it responded for the first time under date of December 16, 1952. The Texas Company also admitted by its admissions dated the 28th day of February, 1955 (Plaintiff's Exhibit 7) that the letter from The Texas Company, in answer to the letter of October 28, 1952, was postmarked December 26, 1952. From these answers to interrogatories and admissions and from the pleadings, it is clear that The Texas Company continued its use of the plaintiff's lands in connection with its operations upon other lands, after the letter of October 28, 1952, received by it on October 30, 1952, until the 22nd day of November, 1952. It is our contention, with which the lower court agreed, that The Texas Company thereby became indebted to the plaintiff in the sum of \$150.00 per day for each day of such use. By mathematical computation, this amounts to \$3,600.00, the amount awarded by the court.

In support of our contention and in support of the court's findings, we direct this Court's attention to Section 13-320, Revised Codes of Montana, 1947, which provides as follows:

"Performance of the condition of a proposal, or the acceptance of a consideration offered with a proposal, is an acceptance of the proposal."

There can be no question concerning the acceptance by The Texas Company of the consideration offered by the plaintiff in connection with his offer of Revocable License.

As we have pointed out, The Texas Company admitted the continued use of the road ways until November 22, 1952. Furthermore, The Texas Company, by its answer of December 11, 1953, to interrogatories submitted to them by the plaintiff (Plaintiff's Exhibit 3) admitted the use of 15,000 barrels of water from plaintiff's Section 23 for use in drilling on Section 22, between September 14, 1952, and November 12, 1952. By virtue of Section 13-320, Revised Codes of Montana, 1947, above quoted, this continued use after the letter of October 28, was an acceptance of the proposal contained in that letter. Furthermore, it was such an acceptance as was contemplated by that letter. See *Steinbrenner v. Minot Auto Company*, 56 Mont. 27, 35, 180 Pac. 729, wherein the Supreme Court of Montana said:

"It is also settled law that the party making the offer may prescribe the mode by which acceptance shall be made, if at all."

Plaintiff made the offer of the Revocable License to The Texas Company, that a continued use would be deemed an acceptance. The Texas Company admits that the use was without right. They further admit that they continued the use, thus accepting the consideration offered with the proposal. We fail to see how there can be any serious question as to the right of the plaintiff to recover from these defendants, at the rate of \$150.00 per day, upon this aspect of the case. See also Section 13-325, Revised Codes of Montana, 1947, which provides as follows:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations

arising from it. So far as the facts are known or ought to be known, to the person accepting."

In the face of the letter of October 28, 1952, The Texas Company could not continue its use of the plaintiff's lands in connection with its operations upon other lands without incurring the attendant obligations. We submit that the appeal of The Texas Company from that portion of the Judgment, awarding to the plaintiff the sum of \$3,600.00 as compensation under the Revocable License, is clearly without merit.

Concerning the use by the defendant, The Texas Company, of the plaintiff's lands in connection with their operations upon other lands, prior to the letter of October 28, 1952, the question is, of course, one of damages, and the court found the evidence insufficient to determine the amount of such damages, which findings we have specified as error. By its answers to the interrogatories, dated April 13, 1955 (Plaintiff's Exhibit 9) defendant The Texas Company, admitted the commencement of this use on September 3, 1952. By its answers of December 11, 1953 (Plaintiff's Exhibit 3) defendant The Texas Company, admitted that between September 14, 1952 and November 12, 1952, they used 15,000 barrels of water from the plaintiff's Section 23, in drilling on Section 22. They likewise admitted the use of 50 cubic yards of scoria in connection with their operations upon Section 22. It seemed clear that the damages to which the plaintiff was and is entitled on this aspect of the case, would be the value of the use and of the materials and water taken.

As we shall hereinafter demonstrate by authorities to be cited, in connection with another point, value or reasonable value and market value are synonymous. The only evidence before the court from which the value of the water can be determined, is in the testimony of the plaintiff's witnesses, Lillis and Morton. Mr. Lillis testified, from his investigation, that the value of this water at the well was from 15¢ to 20¢ per barrel. (R. 186). Mr. Morton, an oil man of more than thirty years experience in the various aspects of the oil business, testified that the value of the water at the well for drilling purposes, depending upon the distance of the source from the well, was, up to five miles, 25¢ per barrel, with proportionate increases thereafter. (R. 200). The testimony showed that there were other sources of water in the vicinity from one to four miles distant. (R. 186-187). The only user and the only market apparent in the vicinity was the defendant The Texas Company, and we recognized and recognize that there are other sources of water in the area from which the defendant The Texas Company, could have procured its supply of water without cost for the water itself. Upon this basis, it is our theory that the price which The Texas Company should be willing to pay for this water and the price which the plaintiff should be willing to accept, should be measured by the cost of procuring the water from the other sources of supply. It is, therefore, our contention that the market value of the water can best be measured by the cost of transporting water from the free source to the defendant's well sites. Consequently, the testimony of Lillis and Morton and of the plaintiff, Russell (R. 205) on this



matter, supplies a competent and accurate measure of the market value of the water wrongfully used by the defendant The Texas Company. See *Rider v. Cooney*, *infra*, 94 Mont. 295, 23 Pac. (2d) 261.

Defendant The Texas Company, used 15,000 barrels of water over a period of 57 days, an average of 282 barrels a day. Of these 57 days, 45 were prior to the letter of October 28. That is approximately 12,690 barrels of water used prior to the letter of October 28, and plaintiff's recovery at the lowest figure testified to, should have been \$1,903.50 for this water.

The only testimony before the lower court as to the value of the use of the roads for access to defendant The Texas Company's operations on lands other than the lands of the plaintiff, is the testimony of Mr. Lillis, who testified that the use of these roads should be reckoned at at least \$2.00 per day. (R. 182) This testimony was not disputed or contradicted. The Texas Company, having commenced its use of these roads for operations on lands other than those of the plaintiff on September 3, 1952, plaintiff's recovery for the use of the roads up to the time of the letter of October 28, should have been \$110.00.

Mr. Lillis testified that the scoria used by the defendant The Texas Company was reasonably worth 50¢ per yard in the quarry. (R. 184) The defendant's witness, Mr. Bliss, testified that they had purchased scoria at 5¢ per yard in the quarry and he himself admitted that he considered this an unusually good deal. (R. 220-221) At any rate, for the 50

yards of scoria admittedly used in connection with defendant's operations upon other lands than those of the plaintiff plaintiff should have been entitled to recover at least the sum of \$25.00.

By mathematical computation, plaintiff's recovery in connection with the use by Defendant The Texas Company, of plaintiff's lands in connection with their operations upon other lands, should have been the sum of \$5,378.50. Of this the court allowed only \$3,600.00 due under the Revocable License.

(b) *Market Value of the Surface Area in Section 23 Utilized by the Defendant, The Texas Company*

It is, of course, the contention of the plaintiff and appellant, as it has been from the beginning, that the reservation of mineral rights of the Northern Pacific Railway Company, pursuant to which that company purported to lease to the defendant The Texas Company, is void. However, in view of the fact that defendant The Texas Company, admitted an indebtedness to the plaintiff for the reasonable market value of such portions of surfaces of the plaintiff's lands as were used (See separate answer of The Texas Company [R. 35]), and in view of the fact that the testimony reveals particularly the testimony of the witness, Lillis (R. 178), that the productivity of the lands utilized by the defendant, The Texas Company, is completely destroyed, it was proper for the lower court to determine and award to the plaintiff the reasonable market value of the surface utilized by the de-

endant, The Texas Company. In this connection, it is our contention that the lower court adopted an incorrect measure of the value of the surface utilized and destroyed by defendant, The Texas Company.

It is apparent that the lower court based its determination of the market value of the surface upon the basis of the use of the land for grazing purposes. It is our contention that such was not the proper basis for valuing the land. In *Rider v. Cooney*, 94 Mont. 295, 308, 23 Pac. (2d) 261, the Supreme Court of Montana, said:

“ ‘Value’ means the price which property could command in the market. By ‘value,’ in common parlance, is meant ‘market value,’ which is no other than the fair value of property as between one desiring to purchase and another desiring to sell; and the words ‘value’ and ‘market value’ are often used interchangeably, and both as being the equivalent of ‘actual value’ and ‘salable value.’ (*James v. Speer*, 69 Mont. 100, 220 Pac. 535. See. also, *State v. Hoblitt*, 87 Mont. 403, 288 Pac. 181; *State ex rel Snidow v. State Board of Equalization*, 92 Mont. 19, 17 Pac. (2d) 68.) ”

Section 93-9913, R.C.M., 1947, relating to eminent domain proceedings, provides in part as follows:

“ \* \* \* and its actual value at that date shall be the measure of compensation of all property to be actually taken, \* \* \* . ”

In the case of *State v. Hoblitt*, 87 Mont. 403, 413, 288 Pac. 181, the Montana Supreme Court, speaking of this statute, said:

"Section 9945, Revised Codes of 1921, provides that 'for the purpose of assessing compensation and damages (in a condemnation proceeding), the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation of all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected.'

The 'actual value' is the market value, 'the price that would in all probability result from fair negotiations where the seller is willing to sell and the buyer desires to buy.' (Northern Pac. & Mont. Ry. Co. v. Forbis, 15 Mont. 452, 48 Am. St. Rep. 692, 39 Pac. 571; Maxon v. Gates, 136 Wis. 270, 116 N.W. 758, 765.)

"The owner has the right to obtain the market value of the land, *based upon its availability for the most valuable purpose for which it can be used, whether so used or not.* (Montana Ry. Co. v. Warren, 6 Mont. 275, 12 Pac. 641)." (Emphasis supplied).

Defendant, The Texas Company, has by its operations demonstrated that the most valuable use to which this land can be put, is for the purpose of producing oil, and it is this use which we contend must determine the market value of the land used by The Texas Company. (See Plaintiff's Exhibit 10). In other words, it is our contention that this value must be determined as it would be determined between the plaintiff and the defendant, The Texas Company, if there were no reservation of the right to go upon the land for the purpose of mining for and removing minerals. It must be determined, as it would be determined if The Texas Company were required to negotiate with the plaintiff, Russell

for the purpose of purchasing so much of the surface as might be necessary for its operations. See *Yellowstone Park R. R. Co. v. Bridger Coal Co.*, 34 Mont. 545, 556, 87 Pac. 963, wherein Mr. Chief Justice Brantley, speaking for the Supreme Court of the State of Montana, said:

“and, in determining the amount which they are entitled to recover, the court is bound to take into consideration every element of value which would be taken into consideration if the plaintiff were negotiating a sale with the defendants as a willing purchaser and the defendants were willing sellers. (*Boom Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 206; *Webster v. Kansas City etc. Ry. Co.*, 116 Mo. 114, 22 S.W. 474; *Denver etc. R.R. Co. v. Griffith*, *supra.*)”

In other words, the fact that appellant is in effect forced to sell the surface required by The Texas Company to The Texas Company, should not be considered in a determination of the market value. See also the definition of market value appearing in *Black's Law Dictionary*, page 1162, as follows:

“The market value of an article or piece of property is the price which it might be expected to bring if offered for sale in a fair market; *not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner*, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular article or piece of property. See *Winnipiseogee Lake, etc., Co. v. Gilford*, 67 N.H. 514,

35 A. 945; *Muser v. Magone*, 155 U.S. 240, 15 S. Ct. 77, 39 L. Ed. 135; *Esch v. Railroad Co.*, 72 Wis. 229, 39 N.W. 129; *Sharpe v. U.S.*, 112F. 989, 50 C.C.A. 597, 57 L.R.A. 932; *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S.W. 792, Am. St. Rep. 51; *Lowe v. Omaha*, 33 Neb. 587, 50 N.W. 763; *San Diego Land Co. v. Neale*, 78 Cal. 63, 20 P. 372, 3 L.R.A. 83; *Consolidated Gas, Electric Light & Power Co. of Baltimore v. City of Baltimore*, 130 Md. 20, 99 A. 968, 972; *People ex rel Brown v. Purdy*, 186 App. Div. 54, 173 N.Y.S. 782, 784; *Tyson Creek R. Co. v. Empire Mill Co.*, 31 Idaho 580, 174 P. 1004, 1006; *Merchants' Cotton Oil Co. v. Acme Gin Co.* (Tex. Civ. App.) 284 S.W. 680, 682; *William H. Lowe Estate Co. v. Lederer Realty Corporation*, 35 R.I. 352, 86 A. 881, 883 Ann. Cas. 1916A, 341; *Stanley v. Sumrell* (Tex. Civ. App.) 163 S.W. 697, 698; *Illinois Power & Light Corporation v. Parks*, 322 Ill. 313, 153 N.E. 483, 486." (Emphasis supplied)

See also *State et al vs. Bradshaw Land Etc. Co.*, 99 Mont. 95, 109, 43 Pac. (2d) 674, where it is said:

"In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the use to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and

make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The defendants' answers to interrogatories, together with the testimony of the defendant's witness, Traver, reveals that a total of approximately 23.42 acres of the surface of the plaintiff's lands had been used in connection with The Texas Company's operations. (Plaintiff's Exhibit 3) and (R. 210-214). There is no allowance contained in these figures for the reservoir created on the plaintiff's land by the action of The Texas Company. There was some testimony to the effect that this reservoir was of some possible benefit to the plaintiff or to his lessee. We fail to see how this fact could make any possible difference in the liability of The Texas Company to pay to the plaintiff the market value of the property taken for the reservoir. The plaintiff is no more obligated to accept an improvement without compensation than he is obligated to accept a detriment without compensation. According to the testimony of the witness, Lillis, (R. 77) this reservoir occupies approximately two acres of the

plaintiff's lands, which would raise the figure previously stated, to approximately 25.42 acres.

The only testimony before the lower court on the value of the surface for oil well drilling purposes is the testimony of the witness, Morton, who testified, based upon his experience in the field, upon his knowledge of the productivity of this particular area, and with the fact in mind that it is only the surface right involved, that this land, using the figure of 24½ acres, was worth from \$10,000 to \$20,000. (R. 203) We submit that the lower court was in error in allowing The Texas Company to acquire property of immense value to them by payment of a mere pittance to the plaintiff herein, and we submit that the plaintiff was and clearly is entitled to a substantial recovery for this land.

The defendant, The Texas Company, by its answer of December 11, 1953, to interrogatories submitted by the plaintiff, admitted the use of 34,000 barrels of surface water on plaintiff's Section 23 in connection with its operations on Section 23. For this water the plaintiff was allowed nothing by the lower court. It is our contention that this water is clearly a part of the surface taken by the defendant, The Texas Company, for which it must pay the reasonable market value. At the lowest figure in evidence, to-wit: 15¢ per barrel, the reasonable market value of this water is \$5.100.00.

We may be anticipating an argument which will not be presented, but it is our belief that The Texas Company may contend that they were entitled to the use of this water with-



out payment therefor, other than the payment for the amount of the surface used. If such a contention be advanced, it is a contention without merit. In *Prentice vs. McKay et al*, 38 Mont. 114, 117, 98 Pac. 1081, the Supreme Court of Montana, said:

“The United States and the State of Montana have recognized the right of an individual to acquire the use of water by appropriation (Rev. Stats. U.S., Secs. 2339, 2340 (U.S. Comp. Stats. 1901, p. 1437); Revised Codes, Secs. 4840 et seq.; *Wood v. Etiwanda Water Co.*, 122 Cal. 152, 54 Pac. 726; *Welch v. Garrett*, 5 Idaho, 639, 51 Pac. 405; but neither had authorized, nor, indeed, could authorize, one person to go upon the private property of another for the purpose of making an appropriation, except by condemnation proceedings. The general government has merely authorized the prospective appropriator to go upon the public domain for the purpose of making his appropriation (see note to *Heath v. Williams*, 43 Am. Dec. 265, [25 M.E. 209]), and the statutes of this state (sections 4840-4891, above) only apply to appropriations made on the public lands of the United States or of the state, and to such as are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners.”

The reservation of mineral rights upon which the defendant, The Texas Company, depends for its right, is before this Court, in The Texas Company's answer (R. 7). It reads as follows:

“excepting and reserving unto the vendor its successors and assigns forever all minerals of any nature whatsoever, including coal, iron, natural gas and oil,

upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the vendor shall pay to the purchaser the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; the purchaser shall notwithstanding have at all times the right to mine and remove such reasonable quantity of coal as may be necessary for his own domestic use."

This reservation does not purport to give to the grantor any right to the use of the water upon the plaintiff's land, at least not without the payment therefor of the reasonable market value of such water. It is also the rule that reservations such as this may not be asserted or exercised except for the purpose of searching for and extracting minerals. See 28 C.J.S., Easements, Sec. 92; 58 C.J.S., Mines and Minerals, Sec. 159. We submit that under the reservations The Texas Company is equally obligated to pay the reasonable market value of the water as they were to pay the reasonable market value of the surface of the land itself.

Upon reason and authorities, it is submitted that the plaintiff herein was entitled to recover from The Texas Company, at least the sum of \$20,683.50.

## CONCLUSION

On the basis of the foregoing arguments and authorities, we submit that the Court below was clearly in error in finding as a matter of law that the mineral reservation of the

Northern Pacific Railway Company, in the deed to plaintiff's redecessor, was and is invalid, and that Specifications of Error Nos. 1 through 7 are well taken.

It is further submitted that the plaintiff herein was entitled to recovery against the defendant, The Texas Company, for the use of his lands and water and materials from his lands in connection with The Texas Company's operations upon other lands during the period of time prior to the offer of a Revocable License, and that Specifications of Error Nos. 10, 13, 14, 15, 17 and 21 are well taken.

It is further submitted that the lower court clearly erred in allowing to the plaintiff only the sum of \$10.00 per acre for the surface of plaintiff's lands utilized by defendant, The Texas Company, and that Specifications of Error Nos. 8, 9, 11, 13, 15, 17 and 20 are well taken.

It is submitted that this cause must be reversed and remanded for such further proceedings as may be necessary to fully adjudicate and determine plaintiff's claims, based upon the first cause of action and to enter proper judgment upon the second and third causes of action in plaintiff's Complaint.

Respectfully submitted,

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## APPENDIX

CHAP. CCXVII—An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,  
\* \* \*

"SEC. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company', its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill.

"SEC. 3. And be it further enacted, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company', its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores,

over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections; \* \* \*

"SEC. 4. And be it further enacted, That whenever said Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, and in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been

constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid: Provided, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: Provided, also, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

"SEC. 5. And be it further enacted, That said Northern Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances, including furniture, and rolling stock, equal in all respects to railroads of the first class, when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line: \* \* \*

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are sur-

veyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An Act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

"\* \* \*

SEC. 8. And be it further enacted, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.

"SEC. 9. And be it further enacted, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time thereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

"SEC. 10. And be it further enacted, That all people of the United States shall have the right to subscribe to the

stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.

"\* \* \*

"SEC. 20. And be it further enacted, That the better to accomplish the object of this act, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this Act."

"(No. 67) A Resolution authorizing the Northern Pacific Railroad Company to issue its Bonds for the Construction of its Road and to secure the same by Mortgage, and for other Purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation; and, as proof and notice of its legal execution and effectual delivery, said mortgage shall be filed and recorded in the office of the Secretary of the Interior; and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound,



via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year hereafter, until the whole shall be completed between said points: Provided, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or de-

fault of said company under the terms thereof, such land shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder: Provided further, That in the construction of said railroad, American iron and steel only shall be used, the same to be manufactured from American ores exclusively.

"Sec. 2. And be it further resolved, That Congress may at any time alter or amend this joint resolution, having due regard to the rights of said company, and any other parties.

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**United States  
Court of Appeals  
for the Ninth Circuit**

---

THEODORE B. RUSSELL,

Appellant,

vs.

THE TEXAS COMPANY, a corporation,  
FREDERICK T. MANNING DRILLING  
COMPANY, a corporation, and  
THE NORTHERN PACIFIC RAILWAY  
COMPANY, a corporation,

Appellees.

THE TEXAS COMPANY, a corporation,

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**Brief of Appellee Railway Company**

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Appeal from the United States District Court for the  
District of Montana

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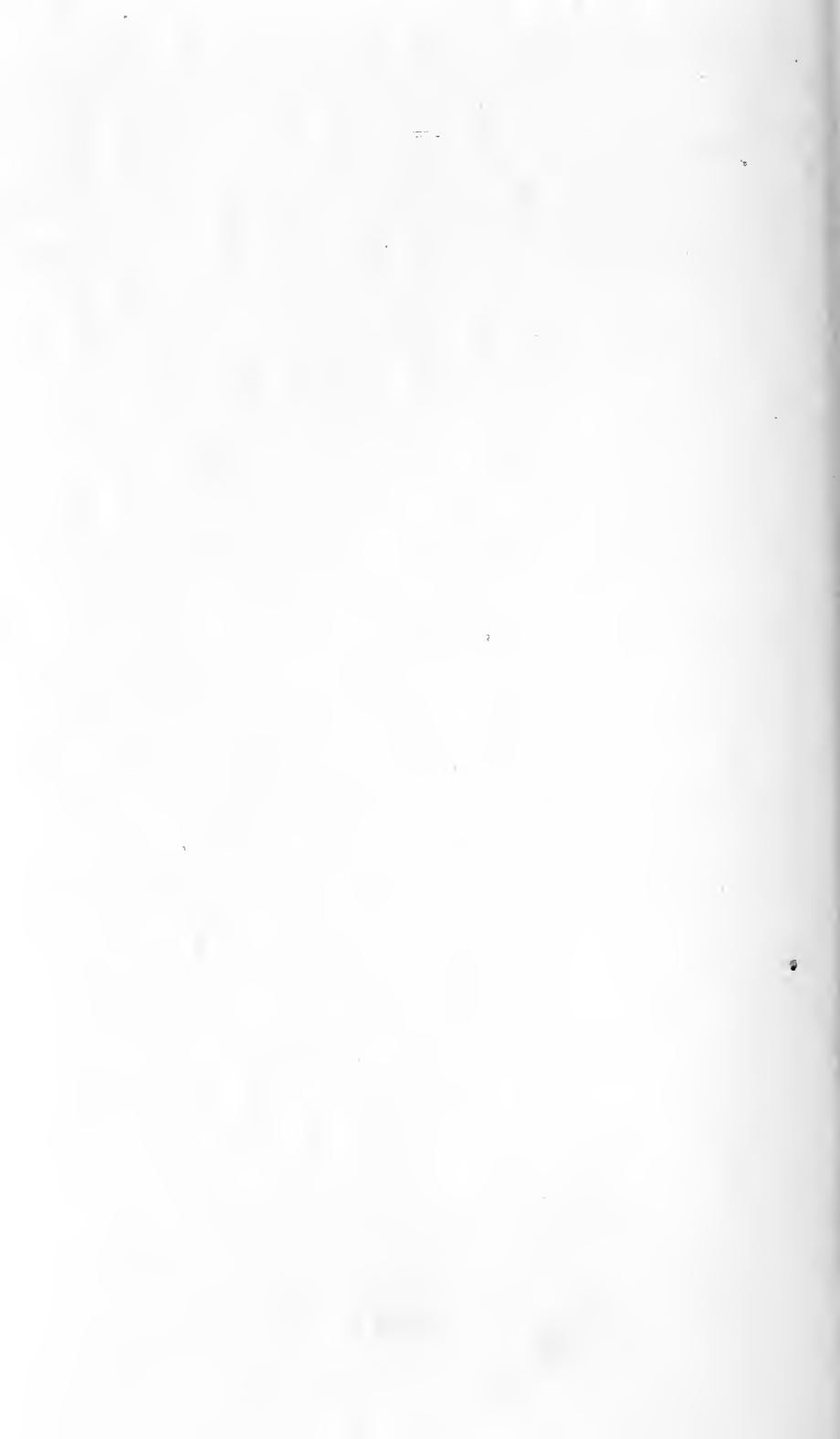
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**FILED**



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# United States Court of Appeals for the Ninth Circuit

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THEODORE B. RUSSELL,

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THE TEXAS COMPANY, a corporation,

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THE TEXAS COMPANY, a corporation,

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vs.

THEODORE B. RUSSELL,

Appellee.

---

## Brief of Appellee Railway Company

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Appeal from the United States District Court for the  
District of Montana

The appellee Railway Company will confine this separate brief to the issue involving the ownership of the mineral fee. The issue involving damages awarded and denied will be covered in a separate brief by appellee and cross-appellant, The Texas Company. A more careful analysis of the factual background will assist both court and counsel. Record references designate T for the original Transcript, ST for the Supplemental Transcript, and Ex. for exhibits.

### STATEMENT OF FACTS

July 2, 1864, is the effective date of the Northern Pacific land grant act (*C. 217, 13 Stat. 365*). Section 3 provided that at the time the line of railroad became definitely fixed, and a plat thereof was filed in the general land office, and the United States at that time had full, unencumbered title, then:

“That there be, and *hereby is* granted to the ‘Northern Pacific Railroad Company’, its successors and assigns \* \* \* every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States \* \* \*.”

By the foregoing, Congress defined for the Territories the “place lands” or “place limits”, located in a strip 40 miles wide on either side of the completed line of road. Realizing that the United States might not have full, unencumbered title to these place lands, and that there might be a deficiency, Congress defined a second strip 10 miles wide, known as “lieu lands” or “first indemnity strip”, located between 40 and 50 miles from, and on



either side of, the completed line of road. Preceding the designation of the first indemnity strip, Section 3 provides:

“and whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been \* \* \* otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior \* \* \*.”

Provisions of Section 6 are of particular pertinence here. Section 6 first required a government survey for 40 miles in width on either side of the entire line of road, the width of the “place strip” in territories. It then provided:

“\* \* \* *the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company,* as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended *to all other lands* on the line of said road, when surveyed, *excepting those hereby granted to said company.* \* \* \*” (Emphasis supplied.)

On May 31, 1870, a Joint Resolution of Congress became effective (*Res. 67, 16 Stat. 378*). We shall discuss the resolution and its legislative history later in this brief. It authorized the railroad company to locate and construct a new main line to some point on Puget Sound via the Columbia river valley, with its branch line from some convenient point on its main trunk line, across the Cascade Mountains, to Puget Sound:

“under the provisions and with the privileges, grants, and duties provided for in its act of incorporation”.

In other words, we must read into the Joint Resolution the sections of the act of 1864, including the two of particular importance here, Sections 3 and 6. The Joint Resolution accordingly provided with respect to the new main line between the Columbia river valley and Puget Sound:

Section 3:

"That there be, and *hereby is* granted to the 'Northern-Pacific Railroad Company', its successors and assigns \* \* \* every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States \* \* \* .

" \* \* \*

"and whenever, prior to said time (that is, prior to the time the line of road was definitely fixed and plat filed), any of said sections shall have been \* \* \* otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior \* \* \* .

Section 6 (after requiring a survey 40 miles in width) :

" \* \* \* *the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the (preemption and settlement laws) shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. \* \* \**" (Emphasis supplied.)

The Joint Resolution then contained the language upon which the appellant relies in this case:

" \* \* \* Provided, that all lands *hereby granted*

to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; \* \* \*."

The joint resolution also created a second indemnity strip between 50 and 60 miles on either side of the entire line of road with one limitation. A replacement selection could be made in the second indemnity strip only within the same state or territory for which there was a deficiency in the basic grant for that state or territory. A selection in the second indemnity strip in Montana required a deficiency in the "place lands" in Montana.

The foregoing constitute the basic statutory provisions upon which appellant claims rights in Montana lands under the settlement and preemption proviso of the Joint Resolution of 1870.

On February 21, 1872, map of the proposed railroad route through the territory of Montana was filed in the federal land office. On April 22, 1872, the Commissioner transmitted an order received by the Register and Receiver on May 6, 1872, directing the withholding from sale, settlement, preemption, or other disposition of all surveyed and unsurveyed odd numbered sections within 40 miles on either side of said railroad. Construction of the railroad was then completed. On June 25, 1881, map showing the definite, fixed and completed location was filed in the federal land office. Section 23, the land involved, has been at all times, and now is, an alternate

odd-numbered section located less than 40 miles from the general route proposed, and from the definite, fixed, and completed line of road, (*ST, Pp. 3-5, No. 1, 2, 3*).

The land within 40 miles on either side of the completed road was surveyed, and plat of survey was filed August 21, 1900. Section 23 involved was included (*ST, Pp. 5, No. 4*). Accordingly, Section 23 at all times was, and is, within the "place limits".

On September 22, 1900, the railway company filed with the federal land office its "List No. 36 (Place)" which included Section 23 involved. On September 30, 1900, the federal land office issued its certificate that the lands were not mineral in character, were not otherwise disposed of, and were within 40 miles of the rail road (*ST, Pp. 5-8, No. 5*).

June 23, 1902, patent issued to defendant railway company, recorded in Dawson County on July 14, 1902 (*Ex.*).

On November 30, 1909, there was a contract for deed (*Ex.*) from the railway company as grantor to MaBelle Cobb, recorded in Dawson County on June 2, 1917, containing this exception and reservation:

" \* \* \* excepting and reserving unto the grantor, its successors and assigns, forever, all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the

surface as may be used for such operations, including any improvements thereon; \* \* \*

On June 14, 1918, the railway company executed and delivered a deed to Millard Stubrud, assignee of MaBelle Cobb, containing the same exception and reservation. The deed was recorded in Dawson County on June 26, 1918 (T, Pp. 59; also Ex.).

The following instruments are on file as exhibits—Sheriff's deed on foreclosure of July 11, 1923, recorded in Dawson County on the same date, issued to Petters and Company; special warranty deed of May 27, 1926, from Petters and Company to Frederick M. Blossom; and special warranty deed of May 27, 1926, from Petters and Company to Frederick M. Blossom; and special warranty deed dated and recorded in Dawson County, Montana, on July 14, 1944, from Frederick M. Blossom and his wife to appellant Russell containing this special warranty:

"Parties of the first part do hereby expressly warrant that they have made no former grants or conveyances of said property, and further warrant, promise and agree that they will defend the said property unto the party of the second part, his heirs, executors and assigns against every and all persons lawfully claiming the same under, by or through the said parties of the first par, *but against none other.*" (Italics supplied.)

Each year since March 1, 1919, Dawson County has levied and assessed, and the railway company has paid, a tax on the railway company's reserved right of entry upon Section 23 (ST, Pp. 8, No. 6).

Complaint herein was filed December 8, 1952, re-

requesting a decree declaring the mineral exception and reservation of the railway company void, invalid, and a cloud on plaintiff's title, and for additional relief against the Texas Company not covered in this brief (*T, Pp. 3-16*).

On February 19, 1953, appellee railway company filed herein its answer (*T. Pp. 37-52*) denying the invalidity of the mineral exception and reservation of the railway company; claiming that defendant railway company owns the mineral fee and the right of entry; and alleging affirmative defenses of failure to state a claim for relief (*T. Pp. 47, Second Defense*), laches (*T, Pp. 47, Third Defense*), estoppel by deed (*T, Pp. 50, Fourth Defense*), and bar of limitation (*T, Pp. 51, Fifth Defense*).

On July 16, 1953, appellee railway company filed herein a separate motion for summary judgment (*T, Pp. 54*) which was granted by the court on November 23, 1953 (*T, Pp. 66-69*), upon which judgment entered (*T, Pp. 69, 126*).

### STATEMENT OF THE CASE

All facts pertaining to the ownership of the mineral fee have been fully developed and are undisputed.

Only those lands in Montana within the "place limits" for which the United States had full and unencumbered title as of the date the line of railroad became definitely fixed, and plat thereof was filed with the general land office, were embraced within the language "hereby granted" in Sections 3 and 6 of the Act of 1864. After July 2, 1864, the United States had no power to sell the

“place lands” to anyone other than the company. Those “place lands” were “hereby granted” as of the date of the act of July 2, 1864, whether they were surveyed or not.

Section 23 involved in this case has been at all times within the “place limits” in Montana both before and after survey. The United States had unencumbered title to Section 23 as of the date the line of the railroad became definitely fixed, and the plat was filed in the general land office. Title to Section 23 vested in the railway company in praesenti as of July 2, 1864. The issue of patent by the United States to the railway company in 1902 confirms the vesting of title by reason of fulfillment of the terms and conditions of the grant of 1864.

No indemnity lands were included within the language “hereby granted”. “Indemnity lands” were those “other lands” at all times open to settlement and pre-emption as specified in Section 6 of the Act of 1864. The railroad company acquired no title in “indemnity lands” until first, the grant of “place lands”; second, a deficiency in the “place lands”; third, a survey; fourth, an act of selection by the railroad company; fifth, clear title in the United States as of the date of selection; and sixth, approval by the Secretary of Interior and issue of a patent to the railroad company. Between July 2, 1864, and the date of selection, the United States had power to dispose of indemnity lands. They were not “hereby granted”.

The Joint Resolution of 1870 authorized a new main

line between Portland and Puget Sound not contemplated by the Act of 1864, and made a new and additional grant of lands between Portland and Puget Sound under the same provisions, and with the privileges, grants and duties provided in the act of 1864. The language "hereby granted" contemplated the "place lands" only between Portland and Puget Sound. The legislative history reflects that Congress intended the settlement and preemption proviso to apply only to those lands "hereby granted" by the resolution; that is, the "place lands" between Portland and Puget Sound. No indemnity lands were included within that language "hereby granted". No lands in Montana, whether place lands or indemnity lands, were or are subject to the settlement and preemption proviso upon which appellant relies.

Furthermore, the patent issued in 1902 by the United States to the railway company conveyed both surface fee and mineral fee. It is conclusive evidence of the title vested in the railway company as against all those whose rights did not commence before its issue. The title of the predecessor's in interest of this appellant depends upon, and stems from, the deed given by the railroad company in 1918 to Stubrud, and which contained a specific, express exception and reservation of minerals. Appellant had only a special warranty deed in 1944 from Blossoms that they would defend title against all persons claiming under Blossoms, but against none other. Appellant is estopped from questioning the mineral reservation.



Finally, appellant is barred by limitations and by laches.

## ARGUMENT

### I. *THE SETTLEMENT AND PREEMPTION PROVISIO APPLIES ONLY TO THE PLACE LANDS BETWEEN PORTLAND AND PUGET SOUND.*

#### A. *Analysis Of Land Grant Acts.*

##### 1. *Act of July 2, 1864 (C. 217, 13 Stat. 365).*

The authorities hold that the "place lands" only were embraced within the terminology "hereby granted". Title to all those granted lands, those "place lands" not otherwise disposed of, or settled upon or preempted, or mineral in character, when the line became definitely fixed, vested immediately in the company in praesenti as of July 2, 1864.

It was contemplated by Congress that there would be many sections of land within the "place limits" which, prior to the time the line of road became definitely fixed, would be mineral in character, or settled upon or preempted. No right, title or interest in such sections ever passed to the company and they were sections or lands lost to the grant.

Having in mind those sections which might be lost to the grant as of the date the line of road became definitely fixed, and to compensate for the deficiency, Congress in the Act of July 2, 1864, created a "first indemnity strip" 10 miles wide located between 40 and 50 miles from the definitely fixed line of road in territories,

and 20 to 30 miles in states. For each section of land in the "place strip" lost to the grant, the company could select a replacement section, or indemnity section, in that first indemnity strip. If that replacement section was not at the date of selection settled upon or preempted, or mineral in character, the Secretary of Interior could approve the selection, and issue patent to the company. Selection could be made only after the government survey was completed.

It is easy to see why the Department of Interior in its decisions, and the Supreme Court of the United States in its decisions, have held repeatedly that lands in the indemnity strip were not lands "hereby granted". Only those "place lands", title to which vested in the company in praesenti as of July 2, 1864, were lands "hereby granted" by the act.

Section 6, after first requiring a survey for 40 miles in width on both sides of the road, provided:

"and the odd sections of land *"hereby granted"* shall not be liable to sale, or entry, or preemption *before or after they are surveyed*, except by said company as provided in this act; but the provisions of the (preemption and homestead acts) shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, *excepting those hereby granted* to said company \* \* \*."

Whenever the government had clean title on the date the line of road became definitely fixed, and plat thereof was filed, title to the "place sections" vested immediately in the company in praesenti as of July 2, 1864, under the term "be, and hereby is, granted" in Sec. 3 of the Act

of 1864. The government could not reserve them, take them back, or sell or dispose of them to anyone else, from July 2, 1864, they belonged to the company. Subsequent issue of patent simply confirmed the title. Those were the sections contemplated by the language "hereby granted" in the Act of July 2, 1864.

The words "hereby granted" did not contemplate any land in the indemnity strips. Title to the indemnity lands as well as right of control, remained in the government at all times after July 2, 1864, subject to sale, settlement or preemption, until completion of a government survey; a deficiency in the "place limits"; an act of selection by the company; unencumbered title in the United States as of the date of selection; approval of the selection by the Secretary of Interior, and issue of patent to the company. Title to all indemnity lands remained in the government, or passed from the government to qualified settlers or preemptors, at all times between July 2, 1864, and the date of approval of the selection by the Secretary of the Interior. As of the date of July 2, 1864, the company might never obtain title to any lands in the indemnity strips. Accordingly, they were not "hereby granted".

## *2. Joint Resolution of May 31, 1870*

*(Res. 67, 16 Stat. 378).*

The joint resolution of May 31, 1870, authorized a new main line between Portland and Puget Sound, and made a new, second, additional grant of land between Portland and Puget Sound that had never been granted before, and which was not contemplated by the Act of

July 2, 1864. It was on exactly the same terms and conditions as the act of 1864. The new line was authorized between Portland and Puget Sound:

“under the provisions and with the privileges, grants, and duties provided for in its act of incorporation \* \* \*” (*Joint Resolution 67, 16 Stat. 378*).

That is, it granted in praesenti as of May 31, 1870, “place lands” between Portland and Puget Sound not otherwise disposed of when the line of road became definitely fixed between those two points and plat thereof was filed in the land office. After May 31, 1870, the United States had no power to sell or dispose of those “place lands”. Those “place lands” between Portland and Puget Sound were the only lands embraced within the terminology “hereby granted” as used in the joint resolution.

That Resolution also created the “first indemnity” strip between Portland and Puget Sound, and a “second indemnity strip” along the entire line. Selections in the “second indemnity” strip could be made only in the same state or territory in which there was a deficiency in the “place lands” of that state or territory.

As to lands in the first or second indemnity limits, acquisition of title by the company depended upon the following factors—first, the grant of “place lands”; second, a deficiency in the amount or number of sections granted in the “place limits”; third, a government survey; fourth, an act of selection by the company; fifth, clear title in the United States as of the date of selection;

and sixth, approval of the selection by the Secretary of Interior and issue of patent.

Title to all lands in the first and second indemnity strips, between Portland and Puget Sound, and in the second indemnity strip along the entire line, remained in the government, and were subject to settlement or pre-emption, at all times between May 31, 1870, and the date of the occurrence of the sixth factor or event listed above, approval by the Secretary of Interior of a selection by the company. As of May 31, 1870, the company might never acquire any right, title, or interest in the lands in the first indemnity strip between Portland and Puget Sound, or in the second indemnity strip in any state or territory. They were not lands "hereby granted."

It is clear from the legislative history of the Joint Resolution, from the terminology of the resolution itself, from the decisions of the Department of the Interior and the United States Supreme Court, that the resolution made a new grant of lands between Portland and Puget Sound that did not exist before; that the only lands "hereby granted" by the resolution were the place lands between Portland and Puget Sound; and that the language "hereby granted" in the settlement and preemption proviso did not contemplate lands in the first or second indemnity limits in any state or territory.

a. *The Joint Resolution Made a New Grant Between Portland and Puget Sound.*

The act of 1864 granted no lands and no rights of construction between Portland and Puget Sound. Under

that original grant, Portland was connected with the east by the branch line down the Columbia River.

*Railroad Grant, Feb. 17, 1892,  
14 L. Dec. 187;*

*N. P. v. McRae, Sept. 30, 1887,  
6 L. Dec. 400;*

*N. P. R. R. Co., March 21, 1894,  
18 L. Dec. 255.*

The Supreme Court of the United States in the case of *United States v. N. P. R. Co., March 5, 1894, 14 S. Ct. 598, 152 U.S. 284, 38, L. Ed. 443*, said:

“The first and principal question is whether the act of July 2, 1864, contained a grant of lands in aid of the construction by the Northern Pacific Railroad Company of a railroad and telegraphic line from Portland to Puget sound.

“\* \* \* It is clear that the purpose of Congress, by the act of 1864, was not to connect Portland with Puget Sound by a road established upon the most direct or eligible route between those places, but, so far as Portland and its vicinity were concerned, to connect them with the east by a branch road, through the valley of the Columbia river, that would strike the main trunk line connecting Puget sound and Lake Superior. There was no purpose, by that act, to make a grant of lands for a road to be located and constructed from a point ‘at or near Portland’ to Puget sound.

\* \* \*

“Coming next to the joint resolution of May 31, 1870, which was accepted and acted upon by the company, we find, in connection with authority to issue bonds in aid of the construction and equipment of its road, to be secured by mortgage, that express authority was given, for the first time, to the Northern Pacific Railroad Company ‘to locate and con-

struct under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget sound, via the valley of the Columbia river, with the right to locate its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.' \* \* \* We cannot agree that this resolution is to be held, in this respect, as simply a recognition by congress of an existing right in the company to locate and construct a road from Portland to Puget Sound, with the right to obtain lands, in aid thereof, as provided in the act of 1864. On the contrary, *it should be regarded as giving a subsidy of lands in aid of the construction of a new road, not before contemplated, that would directly connect Portland and its vicinity with Puget sound.*

"This view is supported by the action of the interior department in the case of Railroad Co. v. McRae, 6 Dec. Dep. Int. 400."

The same Court said in *N. P. R. Co. v. DeLacey*, May 22, 1899, 19 S. Ct. 791, 174 U.S. 622, 43 L. Ed. IIII:  
11:

"The grant of lands to aid the construction of that portion of the main line of the railroad of the plaintiff in error between Portland and Puget Sound dates from the joint resolution of May 31, 1870, and prior to that time there was no land grant in aid of the construction of that portion of the road. \* \* \*

"The defendant contends that the land in controversy was excluded by operation of law from the grant of 1864 by the resolution of May 31, 1870. Herein he assumes that the effect of that resolution was to blot out the grant under the act of 1864. The resolution did not have that effect. *It was not an amendment to the third section of the act of 1864 which granted the lands.*"

In the case of *United States v. Northern Pacific Rail-*

*way Company, 1904, 24 S. Ct. 330, 193 U.S. 1, 48 L. Ed. 593*, involving lands in an overlap between the two granting acts, the Supreme Court stated:

“By the act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), a grant was made to the Northern Pacific Railroad Company in aid of the construction of a railway from Lake Superior to some point on Puget sound, \* \* \*.

“On May 31, 1870, Congress passed a joint resolution *making an additional grant* to the same company for the location and construction of ‘its main road to some point on Puget sound via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget sound.’ 16 Stat. at L. 378.

*“The line east of Portland provided for in the act of 1864 formed nearly a right angle at Portland with the line from there to Puget sound provided for in the joint resolution, and thus the two grants overlapped and the lands in suit fell within the overlap.*

“But the line down the Columbia from Wallula to Portland was never built, and the grant was forfeited September 29, 1890 (26 Stat. at L. 496, chap. 1040, U. S. Comp. Stat. 1901, p. 1598), while the line from Portland to Puget Sound and east across the Cascade mountains was built and the *grants earned.*” (*Italics supplied, 24 S. Ct. at 331.*)

*Kimes v. Northern Pacific Railway Company, 1914, 49 Mont. 573, 144 Pac. 156*, involved a claim in Montana by an alleged bona fide settler against the defendant railway company and its successors in interest. The Montana Supreme Court, relying on the Nelson case, apparently felt the land in Montana was granted by the Act of 1864, because although the statutory source of the title was



discussed, there was no reference whatsoever to the Joint Resolution of 1870.

### 3. *Legislative History of Joint Resolution.*

The Land Decisions of the Department of the Interior, as well as the decisions of the Supreme Court, relied in part on the legislative history of the Joint Resolution in support of their conclusion that the settlement and preemption proviso of the resolution applied only to the lands granted by the resolution between Portland and Puget Sound. They described the legislative history as convincing.

*N. P. v. McRae*, 6 L. Dec. 400;

*U. S. v. N. P.*, 14 S. Ct. at 603;

*U. S. v. N. P.* 61 S. Ct. at 287.

Senate supporters of the resolution pointed out repeatedly that the only new land granted was between Portland and Puget Sound. The opponents insisted upon a settlement and preemption proviso, and repeated amendments were offered to apply the proviso to all lands "heretofore" granted, as well as to all lands "hereby granted" by the resolution. They were all defeated. The supporters made it clear time and again that the settlement and preemption proviso should apply only to the lands "hereby granted" between Portland and Puget Sound. The joint resolution that finally passed the Senate was with that congressional intent and understanding. Action by the Senate in 1870 is found on the following pages of the Congressional Globe: Feb. 8, Pp. 1097; Feb. 22; Feb. 28, Pp. 1584-1586; Mar. 2, Pp. 1624-1627; Apr.

7, Pp. 2480-2486; Apr. 7, Pp. 2491-2495; Apr. 9, Pp. 2539-2547; Apr. 11, Pp. 2569-2584; Apr. 20, Pp. 2833-2848; Apr. 21, Pp. 2867-2869.

Proceedings before the House occurred on May 5 (*Pp. 3263-3271, Cong. Globe*); May 10 (*Pp. 3343-3348, Cong. Globe*); May 11 (*Pp. 3365-3368, Cong. Globe*); May 25 (*Pp. 3786-3798, Cong. Globe*); and May 26 (*Pp. 3850-3853, Cong. Globe*) on which date the joint resolution passed the House.

We shall not quote all of the legislative history. The following brief excerpts will illustrate that when the House considered the Resolution, the House understood clearly that the Senate had intended the settlement and preemption proviso to apply only to the new grant between Portland and Puget Sound, and that the Senate had defeated all amendments and attempts to apply the proviso to the lands granted by the act of 1864. Similar amendments were attempted in the House and were all defeated.

Mr. Hawley and Mr. Sargent offered amendments that all lands granted to the company be subject to the settlement and preemption proviso (*Pp. 3367, Cong. Globe, May 11, 1870; Pp. 3788, Cong. Globe, May 25, 1870*). Mr. Sargent then said:

"Mr. SARGENT. The joint resolution as it passed the Senate and as now pending, provides that if after five years the lands granted by this bill are not sold they shall be subject to settlement and preemption like other lands, at not exceeding \$2.50 an acre. I wish to extend that provision to all lands granted by any law to this company; \* \* \*."

(*Pp. 3788, Cong. Globe, May 25, 1870.*)

Other amendments were likewise offered to impose the proviso on all lands, those granted by the resolution, and those by the act of 1864.

"Mr. WHEELER. I do not object to votes being taken on the amendments which have been offered.

"The SPEAKER. Amendments have been offered by the gentleman from Illinois, (Mr. Hawley,) and the gentleman from California, (Mr. Sargent.) Other gentlemen have indicated their desire to offer amendments, if they were allowed to do so. The gentleman from Pennsylvania (Mr. Cessna) objected, as he had the right to do, to any more amendments being offered than were in order. The Chair will take the direction of the gentleman having charge of the joint resolution.

"Mr. WHEELER. We have no objection to the amendments being submitted.

"The SPEAKER. These amendments, then, will be considered as pending, and the previous question will be considered as operating upon them.

"Mr. CESSNA. I reserve my objection to the second amendment of the gentleman from California, (Mr. Sargent.) The reason of my objection is that the gentleman from Ohio (Mr. Welker) has substantially offered the same amendment.

"Mr. SARGENT. My amendment is offered as a substitute.

"The SPEAKER. If there be unanimous consent, all of the amendments offered will be considered as pending excepting the amendment offered by the gentleman from California, which has been indicated.

"Mr. SARGENT. It is not the same as the amendment of the gentleman from Ohio, (Mr.

Welker,) and I ask that the amendment of the gentleman from Ohio (Mr. Welker) may be read to show that it is not the same.

"The Clerk read as follows:

" 'Add to the first section as follows:

" *'Provided further, That as to all new grants herein of additional lands, such lands shall be sold by said company to actual settlers at a price not exceeding \$2.50 per acre, and in quantities not exceeding one hundred and sixty acres to any one person.'*

"Mr. SARGENT. This simply refers to new lands granted by this joint resolution, while mine refers to all lands which have been granted heretofore, which may be granted under this proposition.

"The SPEAKER. The first amendment in order is the amendment of the gentleman from Illinois, (Mr. Hawley,) which covers all the lands, and as the question first recurs on that amendment, it will be read.

"The Clerk read as follows:

" 'Add to first section as follows:

" *'And provided further, That the privileges herein granted are upon the following conditions, namely: all the lands herein or heretofore granted to said railroad company shall be sold to actual settlers only, and in quantities not greater than one hundred and sixty acres to any one person, and for a price not exceeding \$2.50 per acre; And provided further, That no mortgage that may be given by said railroad company shall operate to prevent the sale to actual settlers only upon the terms and conditions herein provided, of all the lands herein or heretofore granted by the United States to said railroad company; and any violation of this condition shall work for a forfeiture of all the lands herein or heretofore granted by the United States to said railroad company.'*

"Mr. SARGENT. I rise to a point of order. Mine was the second amendment offered, and it is in order under the rules, and no single objection can stop it.

"The SPEAKER. The gentleman from California is correct, and the gentleman from Pennsylvania will be unable, by his objection, to cut off the gentleman from California from having his amendment considered." (*Pp. 3792, Cong. Globe, May 25, 1870.*)

\* \* \*

"The SPEAKER. The question is first on the amendment offered by the gentleman from Illinois, (Mr. Hawley,) which is first in order, and which will now be reported by the Clerk.

"The Clerk read as follows:

" 'Add to first section as follows:

" '*And provided further, That the privileges herein granted are upon the following conditions, namely: All the lands herein or heretofore granted to said railroad company shall be sold to actual settlers only, and in quantities not greater than one hundred and sixty acres to any one person, and for a price not exceeding \$2.50 per acre; And provided further, That no mortgage that may be given by said railroad company shall operate to prevent the sale to actual settlers only, upon the terms and conditions herein provided, of all the lands herein or heretofore granted by the United States to said railroad company, and any violation of this condition shall work a forfeiture of all the lands herein or heretofore granted by the United States to said railroad company.*'

"Mr. FARNSWORTH. We may as well have the yeas and nays on the amendment.

"The yeas and nays were ordered.

"The question was taken; and it was decided in

the negative—yeas 78, nays 106, not voting 45; as follows:

“ \* \* \*

“So the amendment was not agreed to.” (*Pp.* 3797, *Cong. Globe*, May 25, 1870.)

\* \* \*

“The SPEAKER. The next question is on the amendment offered by the gentleman from California, (Mr. Sargent,) which the Clerk will read.

“The Clerk read as follows:

“Strike out all after the word “points,” in line thirty-nine, page 3, down to and including the word “bidder,” in line fifty-five, page 3, and insert:

“*Provided*, That all lands granted to said company shall be subject to settlement and preemption like other lands at a price to be paid to said company not exceeding \$2.50 per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder; and the purchasers at said sale, except actual settlers on not greater subdivisions than one hundred and sixty acres, shall acquire no higher interest in said lands than is by this act granted to said company; and as to all lands purchased under any such sale by any corporation or by any other persons greater in quantity than one quarter section for any one person, all such lands shall be and remain subject to the right of purchase by actual settlers at a price not exceeding \$2.50 per acre, and in amounts not exceeding one quarter section, by any one person, under such rules and regulations as the Secretary

of the Interior may prescribe to carry this provision into effect.'

"Mr. SARGENT. I demand the yeas and nays on agreeing to the amendment.

"The yeas and nays were ordered.

"The question was taken; and it was decided in the negative—yeas 73, nays 104, not voting 52; as follows:

" \* \* \*

"So the amendment moved by Mr. Sargent was not agreed to." (*Pp. 3798, Cong. Globe, May 25, 1870.*)

Numerous other amendments were then voted down and finally, on May 26, 1870, the Joint Resolution passed the house.

"The main question was ordered, which was upon the passage of the joint resolution.

"Mr. HOLMAN called for the yeas and nays.

"The yeas and nays were ordered.

"The question was taken; and it was decided in the affirmative—yeas 107, nays 85, not voting 37; as follows:

" \* \* \*

"So the joint resolution was passed." (*Pp. 3853, Cong. Globe, May 26, 1870.*)

We have necessarily, of course, omitted the great bulk of the discussions and debates in Congress. The foregoing are a portion only.

A careful review and analysis of the legislative history reflects the intention of both houses of Congress that the settlement and preemption proviso upon which appellant relies was intended to apply only to the "place

lands" in the new grant between Portland and Puget Sound, and was never intended to apply to either the "place lands" or the "indemnity lands" in Montana.

4. *The Decided Cases Carry Out The Intent of Congress and Hold That Lands "Hereby Granted" Are "Place Lands" Only, And Not "Indemnity Lands."*

The opinions and decisions of the federal land department have repeatedly noted the distinction between "place lands" and "indemnity lands". Title to "place lands" vested in praesenti as of the date of the legislation. They were lands "hereby granted". The company might never acquire title to the indemnity lands. They were at all times open to settlement and preemption until selected by the company as indemnity lands, followed by issue of patent by the Secretary of Interior. See the following decisions of the land department:

*Priest v. N. P. R. Co., May 23, 1884,*  
2 L. Dec. 506;

*Opinion, May 17, 1883, 2 L. Dec. 511;*

*N. P. R. Co. v. Miller, Aug. 2, 1888,*  
7 L. Dec. 100;

*N. P. v. Davis, July 25, 1894,*  
19 L. Dec. 87, reviewing and reaffirming  
*N. P. v. Miller.*

The Supreme Court of the United States has followed the same reasoning.

*Buttz v. N. P., Nov. 15, 1886, 7 S. Ct. 100, 119 U.S. 55, 30 L. Ed. 330, says:*

" \* \* \* When the general route of the road is thus fixed in good faith, and information thereof



given to the land department by filing the map thereof with the commissioner of the general land-office, or the secretary of the interior, *the law withdraws from sale or pre-emption the odd sections*, to the extent of 40 miles on each side. \* \* \*

“Nor is there anything inconsistent with this view of the sixth section, as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable.”

*Hewitt v. Schultz*, 21 S. Ct. 309, 45 L. Ed. 463, 180 U.S. 139, was decided by the Supreme Court of the United States on January 7, 1901. Hewitt, homestead patentee, filed suit in ejectment against Schultz, a purchaser from the N. P. R. Co. which asserted ownership by reason of the land grant act. The land involved was within the first indemnity strip in the Territory of North Dakota. The opinion relates the history with reference to the definite location of the road. A map designating the general route was filed March 30, 1872. On April 22, 1872, the Secretary of Interior ordered a withdrawal of all lands in the place limits shown on the map of general route. On June 11, 1873, map of definite location was filed. On June 24, 1873, the land department ordered a withdrawal of all lands in the first indemnity strip. The

land in dispute was located in that first indemnity strip. On April 10, 1882, Hewitt settled on the lands and thereafter qualified for a patent unless he was barred from doing so by the earlier withdrawal order of June 24, 1873. No selection had been made by the company before April 10, 1882. In fact it was not until March 19, 1883, that the company filed its "selection list" embracing the land involved. The Department of the Interior relying on *N. P. v. Miller*, 7 L. Dec. 100, and *N. P. v. Davis*, 19 L. Dec. 87, referred to above, held that the lands in the indemnity limits did not fall within the place or granted limits, were not included in the term "hereby granted" as used in Sec. 6 of the act of July 2, 1864, and were open to settlement under the public land laws until a selection had been made by the company. Patent was issued to Hewitt. The ejectment action followed. The Supreme Court of the United States posed the problem with this significant language:

" \* \* \* Was it competent for the Secretary of the Interior, immediately upon the acceptance of the map of definite location, to include in his withdrawal from sale or entry lands within the indemnity limits? Was he invested with any such authority by the act of July 2d, 1864 (13 Stat. at L. 365, chap. 217)? Did Congress intend, by that act, to declare that when the railroad company indicated its line of definite location the odd-numbered sections outside of the 40-mile limit and within the 50-mile limit, on each side of such line, along the whole of the line thus located, should not be subject to the preemption and homestead laws until it was finally ascertained whether the railroad company was entitled, *by reason of the loss of lands within the place*

*or granted limits*, to go into the indemnity limits in order to obtain lands to meet such loss? An answer to these questions may be found in the act of July 2d, 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

“By the 3d section of the act Congress granted to the Northern Pacific Railroad Company (quoting 3rd section).”

The court then quoted section 3 of the act of July 2, 1864, and thereafter said in connection with that question:

“This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress ‘*granted* to the Northern Pacific Railroad Company *only* public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office,’—lands that were not at that time, free from pre-emption or other claims or rights being excluded from the grant. (Citing many cases.) The cases all speak of the granted lands as those within the place limits.”

The court next quoted section 4 of the act of July 2, 1864, following which it said with respect to Section 6:

“But so far as the present case is concerned the most material section of the act is the 6th. That section provided: (Quoting Section 6).

“It is contended that, construing the 3d and 6th sections together, it is clear that the words, ‘the odd sections of land hereby granted,’ in the first part, and the word ‘excepting those hereby granted to said company,’ in the latter part, of the 6th section, refer to the lands described in the 1st section of the act,—that is, to the odd-numbered sections in the place

limits which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to 'all other lands on the line of the said road, when surveyed,' the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road, which were unappropriated when the line of the railroad was definitely fixed; and that if, at the time such line was 'definitely fixed,' it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted, or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the 40-mile and within the 50-mile line, and, under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the 6th section of the Northern Pacific act to the pre-emption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

"This construction of the act of July 2d, 1864, finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31st, 1870, Congress declared (quoting from the Joint Resolution).

"Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits."

The court next discussed prior opinions of the Land Department including *Atlantic & P. R. Co.*, Aug. 13,

1887, 6 L. Dec. 84, and quoted from *N. P. R. Co. v. Miller*, 7 L. Dec. 100, cited above. The court then held:

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done, it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

"But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas, and Smith, and upon which the Land Department has acted since 1888. 'It is the settled doctrine of this court,' as was said in *United States v. Alabama G.S.R. Co.* 142 U.S. 615, 621, 35 L. Ed. 1134, 1136, 12 Sup. Ct. Rep. 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number

of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.' These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d, 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute."

It is noted that there was a dissent in the case of *Hewitt v. Schultz*. For that reason the subsequent opinion of the court in *Southern Pacific Railroad Company v. Bell*, January 13, 1902, 22 S. Ct. 232, 183 U.S. 679, 46 L. Ed. 386, is important. That case involved the Southern Pacific land grant, an Act on July 27, 1866, a land grant identical with that of the Northern Pacific. Because of the importance of the issue involved, the court reviewed the *Hewitt v. Schultz* case, reviewed the entire background of the issue, and specifically and expressly affirmed the decision. In the Southern Pacific case, the land was within the indemnity limit in a state rather than a territory. The court said in part:

"Treating this case as a reargument of the question involved in *Hewitt v. Schultz*, and it practically comes to that, we still adhere to the principle there announced. It seems to us the more reasonable, if not the necessary, inference to be deduced from the language of Sections 3 and 6. By the former there is 'hereby granted . . . every alternate section of public

land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state.' These words terminate the grant, the remainder of the clause being immaterial in this connection, and if the whole clause had been followed by a period, instead of a semicolon, the meaning, perhaps, would have been clearer. But there follows another clause, that 'whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be *selected* by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections,' etc. There is here a clear distinction between the lands granted *in praesenti* by the company, whenever the deficiency in the granted lands shall be ascertained.

"The 6th section carries out the same idea. It requires a survey of 40 miles in width on both sides of the entire line, whether passing through states or territories. This would include only the granted or place limits within a territory, but within a state would cover the indemnity limits as well. There was no order in the act to withdraw any lands from settlement or sale, but such withdrawal seems to have been made in pursuance of the practice of the Interior Department, and for the purpose of preventing lands granted to the railroad company from being taken up by settlers, before the completion of the line and the final issue of patents. As was said by Mr. Secretary Lamar in the Atlantic & P. R. Co. 6 Land Dec. 84: 'Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no

special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken.' But as the power to withdraw extends only to the '*lands hereby granted*' and all other lands, except those hereby granted, remain open to settlement, we are thrown back upon Sec. 3 to determine what are the lands '*hereby granted*'.

\* \* \*

"We are therefore of opinion that the act of July 27, 1866, did not authorize the withdrawal by the Secretary of the Interior of the indemnity lands, that such lands remained open to homestead and pre-emption entry, and that patents issued to settlers within such indemnity limits, based upon the entries made prior to the selection by the railroad company, approved by the Interior Department, were valid as conveyances of the land as against the selection by the railroad company."

In *Oregon & C. R. Co. v. United States*, April 6, 1903, 23 S. Ct. 615, 189 U.S. 110, 47 L. Ed. 730, the court said:

"Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits,—which interest relates back to the date of the granting act,—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make. (Citing and quoting cases.) Having regard to the



adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction, or with the approval, of the Secretary."

In view of the foregoing decisions, it is manifestly clear that the language "hereby granted" in the settlement and pre-emption proviso of the resolution applied only to the "place lands" in the new and additional grant between Portland and Puget Sound. It did not apply to indemnity lands in either the first or second indemnity strip regardless of where they were located. In particular, it did not apply to any lands in Montana.

5. Land Grant Case of 1940; *U. S. v. N. P. Ry. Co.*  
61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210.

The foregoing legislative history, decisions of the Supreme Court of the United States, and Land Decisions of the Department of Interior, alone warrant a judgment on the merits in favor of the respondent. The decision of the Supreme Court in 1940 in the Land Grant Case concludes all discussion on the issue. We have saved the discussion of the case under a separate heading only because it is an extremely complex, complicated and difficult opinion to read, analyze and understand. It takes a thorough grounding in the legislative and judicial history of the land grant to understand it. At least such was our experience.

The line of road became definitely located in Montana on June 25, 1881, long after the enactment of the

Joint Resolution of 1870. Long after that the government of the United States created vast Forest Reserves which included lands in the first and second indemnity strips which had been selected by the company, and to which patents had issued. Prior to the time of patent, however, the Department of Interior had issued an order withdrawing the lands from settlement, pre-emption or selection, but the Secretary had overlooked the withdrawal order and had issued the patents. The government filed suit to cancel the patents. (*Forest Reserve Case, 41 S. Ct. 439, 256 U.S. 51, 65 L. Ed. 825*). As a result of the decision in that case, legislation was enacted to bring about a final settlement of all rights of the company arising out of the land grant acts. The last legislation was June 25, 1929 (*46 Stat. 41*). By the terms of that Act all lands within the indemnity limits of the railroad which on June 5, 1924, were embraced within the exterior boundaries of any National Forest or other Government reservation and which, in the event of a deficiency in the land grant, were available to the Railway Company, by indemnity selection, or otherwise, in satisfaction of such deficiency were to be taken out of the operation of the land grants and retained by the United States as part of the Government reservations wherein they are situate, free of all claims, if any, which the Railroad Company or its successor, the Railway Company might have to acquire the same. Providing, however, that for such lands the Company should be entitled to receive compensation from the United States to the extent, and in the amounts, if any, the Courts

should hold compensation might be due. It declared forfeited all unsatisfied indemnity selection rights claimed by the Railroad Company, or the Railway Company, or any person claiming under either of them, together with all claims to additional lands under the grants by Congress to the Railroad Company. It expressly declared that the right reserved to the United States to amend the Act of 1864, and the Joint Resolution of 1870, should not be considered as fully exercised or waived in any way by the Act, and its passage should not be construed as evidencing the purpose or intention of Congress to depart from the policy of the United States as expressed in the Resolution of May 31, 1870, relative to the disposition of granted lands; and the right was expressly reserved to the United States at any time to enact further legislation relating thereto. It declared that the provisions of the Act should not be construed as affecting the present title of the Railroad Company, or its successors, the Railway Company, or any subsidiary of either or both, to its right of way, or to lands actually used in good faith in the operation of the road. The Attorney General was directed to institute such suit or suits as in his judgment might be required to remove the cloud cast upon the title to the lands belonging to the United States as the result of the claim of the Companies; to procure a judicial determination of all controversies and disputes respecting the operation and effect of the grants, and action previously had under them, and that a full accounting between the United States and the Companies be had of the land grant. It

further directed that in such proceedings there should be submitted to the Court for determination to what extent the terms and conditions in the granting Act had been performed by the United States, and by the Railroad Company, or its successors, including the legal effect of the foreclosure of any or all mortgages claimed to have been placed on the lands by virtue of the Resolution of May 31, 1870, and the extent to which such foreclosure proceedings met the requirements of that Resolution respecting disposition of the granted lands.

It was further directed that by said judicial proceedings it should be determined what lands, if any, had been erroneously patented or certified to the Railroad or Railway Company as the result of fraud, mistake of law or fact, or through legislative or administrative misapprehension as to the proper construction of the grants. And, further, that the United States and the Railroad or Railway Company, or any other person should be entitled to have heard and determined all questions and claims germane to a full and complete adjudication of their respective rights under the Act of July 2, 1864, and the Joint Resolution of May 31, 1870, and all questions of law and fact presented to the joint Congressional committee appointed under authority of the Resolution of Congress of June 5, 1924, notwithstanding that such matters might not be specifically mentioned.

It will be seen from the foregoing abbreviation that in the contemplated litigation directed, it was intended every question from the organization of the company to

the date of the Act that had been, or that now might be, raised, should be presented to the Court and finally determined; and that upon such determination should be based an adjustment of the grant.

Pursuant to the command of the statute, the suit known as the Land Grant case was commenced by the United States government. The United States Supreme Court rendered its opinion in *United States v. N. P. Ry. Co.*, 1940, 61 S. Ct. 264, 311 U.S. 317, 84 L. Ed. 210. (For subsequent action, see 41 F. Supp. 273.)

a. *Issues Presented In Land Grant Case.*

We have examined the pleadings and briefs of both the government and the company that were presented in the Land Grant case. The issue was squarely presented whether or not the settlement and preemption proviso of the joint resolution applied only to the lands granted by the resolution between Portland and Puget Sound, or whether it also applied to lands elsewhere. Paragraph XIII had alleged that the five year period referred to in the proviso terminated on July 4, 1884; that on that date there were millions of acres along the entire line of road between Wisconsin and the Pacific Coast that should have been open to settlement and preemption; that the company failed to open the lands to settlement and preemption; that such was a breach of the contract contained in the Act of July 2, 1864, as modified and supplemented by the Joint Resolution; and that the government was entitled to an accounting.

b. *Analysis of Land Grant Opinion.*

As indicated, we had difficulty in following, understanding, and appreciating the scope of the opinion. Many, many issues were involved. Because of our own difficulty, we offer here a detailed, step by step, analysis of that portion of the case pertinent to the single issue involved here of the scope of the settlement and preemption proviso of the resolution of 1870. The Supreme Court commences its opinion with a summary of the act of July 2, 1864; the financial difficulties in construction; and the act of 1869 authorizing the extension of the branch line from Portland to Puget Sound which the company did not accept; and then said with respect to the Joint Resolution of May 31, 1870:

“May 31, 1870, Congress again authorized the company to issue bonds to aid in the construction and equipment of its road, to be secured by mortgage on all of its property, railroad, land grant, and franchise to be a corporation. It further authorized the location and construction of the main railroad via the valley of the Columbia River to Puget Sound and of a branch from the main line across the Cascade Mountains to Puget Sound, *and made a grant of land in connection with the construction authorized between Portland and Puget Sound, on the same terms as the original grant. It also provided a second indemnity belt extending ten miles beyond the first on either side of the right of way.*” (Emphasis supplied.) (*61 S. Ct. at 269.*)

Note the significant choice of words that the resolution made *a grant* of land between Portland and Puget Sound on the same terms as the original grant. Note also the statement thereafter — “It also provided a second indemnity belt”, thereby not including the second indem-

nity belt within the description of lands *granted* by the resolution.

The court then continued its discussion of the legislative background and history followed by this significant description of the two acts:

"The grant of 1864 was of the ten nearest alternate odd-numbered sections of public land, not mineral, on each side of every mile of the line as definitely located, in a state, and of twenty such sections in a territory. This grant was in praesenti. The lands thus granted are spoken of as 'place lands'. They were in two belts each twenty miles wide in states, and forty in territories, parallel to the right of way.

"Excepted from the grant were lands reserved, granted, appropriated, preempted, or subject to other claims and rights at the date of definite location. These exempted lands are spoken of as 'lands lost to the grant'. In lieu of such lost lands the Act provided that other lands were to be selected by the company, under the direction of the Secretary of the Interior, from odd-numbered sections not more than ten miles beyond the place lands, on each side of the road. The two ten-mile strips thus defined are spoken of as 'the first indemnity belts' or 'the first indemnity limits'.

"The Resolution of May 31, 1870, *granted, as respects the additional line authorized between Portland and Puget Sound, place and indemnity lands, as granted for the original line by the Act of 1864. It also authorized* what are spoken of as 'second indemnity' belts ten miles wide, on either side of the original indemnity limits, in any state or territory in which the company could not obtain the number of sections intended for it by its charter. This additional grant, however, was conditioned that lieu lands in the second indemnity limits might be chosen only in the same state or territory in which place

lands were lost to the grant." (Emphasis supplied.) (*61 S. Ct. 269-270.*)

The court then continued its discussion of the history leading to the Act of June 25, 1929 (*46 Stat. 41*), and the particular litigation involved.

Commencing at page 272 of 61 S. Ct. reporter, and continuing to the top of page 276 the court discussed six claims of the government of alleged breaches and the action taken by the master thereon, upon which the court was equally divided. We are not concerned with five of those six points. We are with No. 4 involving the dismissal by the master of paragraph XIII which referred to the settlement and preemption proviso. The court said:

"The court, after sustaining certain of the plaintiff's exceptions and dismissing almost all of the defendants', found the company entitled to patents for certain lands outside the reserves and to compensation for the loss of 1,453,061 acres of land within them. The court reserved for future decision the contentions of the mortgagees that they are purchasers for value whose rights cannot be affected by the Government's claim and also ascertainment of the amount to be awarded to the company.

"At this stage of the litigation Congress adopted the Act of May 22, 1936, authorizing a direct appeal from the decree of the District Court to this court. Pursuant to that statute the present appeals by the United States and the company were taken. As to many of the issues the parties have accepted the decision of the District Court. Errors are, however, assigned to the decree below by both the Government and the company.

"The Government concedes that the Act of 1929, *supra*, is not a declaration of forfeiture for breach of conditions imposed by the Act of 1864 and the



Resolution of 1870, but a reference to the courts of all questions as to performance and breach of the contracts created by the Act and the Resolution, to the end that the respective rights and liabilities of the parties may be determined and enforced. The company asserts that the Act of 1929 is an exercise of the power of eminent domain whereby the company is deprived of further right to select indemnity lands, and is to be paid just compensation for the right so taken. But the company does not deny that, in ascertaining the amount due it, the Government may offset the amount of any claims it may now be entitled to assert by reason of the company's breaches of contract.

"The Government urges that the breaches of covenant by the company have been so substantial that it cannot call for further performance by the United States and is, therefore, not entitled to further selection rights or to any money compensation for their abrogation. Reliance is placed upon the following alleged breaches. \* \* \*

"4. The claim that the company failed to perform its contract by refusing to open lands granted it by the Resolution of 1870 to settlement and pre-emption at \$2.50 per acre.

"Section 10 of the Act of 1864 provides that 'no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the congress of the United States.'

"An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor. The Resolution empowered the company to issue bonds in aid of construction and equipment, and to 'secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation.' The Resolution further provided 'that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the

mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre.'

"Paragraph XIII of the Bill refers to these provisions of the Joint Resolution and alleges that among the place lands granted there are many million acres the quantity and description of which are known only to the company, or its predecessor, which should have been opened to settlement and preemption whereas they were, subsequent to July 4, 1884, (five years from the date finally fixed for completion of the road), sold at such prices, and on such conditions, as to the company seemed best, and that this was a breach of the company's contract with the United States and defeated the policy of the United States. The master reached the conclusion that the motion to dismiss paragraph XIII should be sustained and the court so ruled.

"The Government insists that the Resolution required the company to hold the lands open for settlement, at the price and in parcels as specified, after five years, whether mortgaged or not; that it failed to do so, and sold the lands at higher prices and in larger parcels than the Resolution required, and that its breach of covenant defeats its right to any award. The company contends that the intent of the Resolution was to permit it to mortgage all its property rights; that if, at the expiration of five years from the completion of the road, any of the granted lands were undisposed of, or were not subject to mortgage, those lands were open to preemption; that, whether or not the existence of a mortgage prevented settlement of the lands, after five years, there was no duty on the company to dispose of them to settlers; and that the company has not broken any covenant in respect of the lands in question.

"The Government asserts that none of the paragraphs referred to above should have been dismissed. It says that each of the breaches charged was so substantial as to disentitle the company to further performance by the United States. But, in any event, it says that all of them, taken together, certainly require this conclusion. The company, on the other hand, contends that, as to some of the matters charged, the allegations of the bill do not show any breach, and that, as to others, if a breach is sufficiently alleged it was not such as, in the light of the history of the grants and the performance received by the United States, would disentitle the company to all further performance.

"If the Government's position is sound the decree below should be reversed and the cause remanded with instructions to enter a judgment against the company and in favor of the United States.

"The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy." (*61 S. Ct. 272-276.*)

The court then continued its discussion with reference to numerous other claims of the government upon which a majority of the court arrived at a decision. The court said:

"The Government puts forward certain further claims which, if sustained, would preclude any recovery by the company." (*61 S. Ct. at 276.*)

We are not concerned in this case with claims numbered 7 through 17. We are concerned with No. 18 (*61 S. Ct. at 287*). The court said:

"18. The company's failure to open lands granted by the Resolution of 1870 to settlement and pre-emption.

"The company's alleged breach in this aspect as a defense to the company's entire claim is mentioned in heading 4, *supra*.

"The bill alleges, in paragraph XIII, the company's failure to open the granted lands to settlement and preemption was a breach of its contract and 'in defeat of the policy of the United States with respect to the disposition of its public domain, \* \* \*.' In paragraph XLII the court is asked to determine the extent to which the company has failed to comply with the obligation imposed by the Joint Resolution pertaining to the disposition of the lands by settlement and preemption and to decree that the company now perform its covenant to the extent this is possible and, where it is found impossible for the company to perform, the plaintiff have such relief as the court may deem proper; and further that the court decree that any and all moneys received by the company from or by reason of the granted lands after the breach of its covenant be declared to have been received by the company in trust for the use and benefit of the United States and that the plaintiff be awarded judgment for the amount of such moneys. The prayer is, therefore, in the alternative for damages or for an accounting, as upon a constructive trust.

*"We hold*, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. *We hold further* that the company was not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands.

*"A majority of the justices who heard this case are of the opinion* that the proviso of the Resolution of 1870 required the company to open the lands

*granted by the Resolution* to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it, or advantage to the company, which resulted from this breach of contract. In this view the court below should not have dismissed paragraph XIII of the bill and that paragraph should be reinstated for the purpose of permitting the Government to prove damages and proof should be submitted thereunder to that end." (61 S. Ct. 287-288).

Some of the discussion of the court with reference to No. 20, the company's claim to indemnity resulting from the Tacoma overlap is also pertinent (61 S. Ct. at 289).

"For an understanding of the contention certain facts must be borne in mind. By the Act of 1864 the line authorized was to run from a point on Lake Superior to some point on Puget Sound, with a branch via the Columbia River to a point at or near Portland. By the Joint Resolution of 1870 the company was authorized to construct its main line to a point on Puget Sound via the valley of the Columbia River with the right to construct its branch from a point on its main line, across the Cascade Mountains to Puget Sound. Thus the resolution altered what had been the proposed main line across the Cascade Mountains into a branch line, and the former branch line to Portland into a section of the main line running down the Columbia River to Portland and thence turning north to Puget Sound. Although by an act of 1869 the company had been authorized to construct a line between Portland and Tacoma, and a right of way had been granted therefor, no grant of lands in aid of such construction was made until the adoption of the Resolution of 1870. That resolution in authorizing the location and construction of this portion of the company's

road, did so in these words: 'Under the provisions and with the privileges, grants, and duties provided for in its act of incorporation'. *Obviously the land grant was the same as that in the charter act, namely, place lands in a strip extending twenty miles on each side of the road in states and forty miles on each side in territories, with an indemnity belt ten miles in width on either side of the exterior limits of the place grant.*

"The legislative history of the resolution shows that Congress was informed the company could not obtain, in connection with its original grant, all that Congress intended it should have, for the reason that, prior to selection of indemnity lands for losses in place lands, much territory had been removed from the operation of the Act by preemption and settlement under the land laws. In order to compensate the company for such losses there was inserted in the Joint Resolution the following: (quoting the provisions for the second indemnity strip.)

*"The Resolution made a new grant in aid of the Portland-Tacoma line. The portion of the Cascade branch (designated as main line in the Act of 1864) entering Tacoma from the east was definitely located in 1884. This location defined the place lands granted by the Act of 1864. The line authorized by the Joint Resolution entering Tacoma from the south was definitely located in 1874, thus earning the grant made by the Resolution.*

" \* \* \* And it is settled that such a grant as that under consideration is a grant not of lands by quantity but of lands in place or by description. Whether Congress intended, *in connection with its later grant of 1870*, to accord the company indemnity for failure to receive, in aid of the Portland-Tacoma line, lands to which it would get title in virtue of its definite location of the Cascade line, is the question. We conclude that Congress did not so intend." (61 S. Ct. 289-291;) (Emphasis Supplied).

We note that in the Land Grant case of 1940 the Court

in its footnotes cited in support of the rules of law there involved its early decision of *Hewitt v. Schultz*, discussed at pages 27-32 of this brief. The Court said on note 17:

“After the company had filed its maps of definite location the Secretary mapped the indemnity limits specified by the Act of 1864 and withdrew the lands comprehended within those limits from sale or entry. In 1888 the then Secretary held that land within the indemnity limits was open to preemption under the homestead laws and that such preemption, even before the actual survey of the lands, deprived the company of the right to select the lands preempted. This view was adopted by this court in 1901. 17

17. *Hewitt v. Schultz*, 180 U.S. 139, 21 S. Ct. 309, 45 L. Ed. 463.”  
(61 S. Ct. at 274-275.)

Again with respect to footnote 20, the court cited *Hewitt v. Schultz* in support of the following:

“Much was said in argument as to the meaning of the phrase ‘lands available as indemnity’ as used in that case. It seems clear that unsurveyed lands are not available to the company under the Act of 1864. It will be observed that the company must select indemnity lands under the direction of the Secretary of the Interior. That officer has invariably ruled that no selection can be made or approved until the lands in question are surveyed.

“This ruling was necessitated by the very terms of the Act of 1864, which requires selection of alternate sections designated by odd numbers. Obviously, until surveyed, no odd-numbered sections could exist. Unserved lands are not public lands. 22

“22. *Hewitt v. Schultz*, 180 U.S. 139, 152, 21 S. Ct. 309, 314, 45 L. Ed. 463; \* \* \*

(61 S. Ct. at 276-277,)

It is clear, accordingly, that the Supreme Court of

the United States had no intention in the Land Grant case of 1940, of reversing either the long line of decisions of the land department, or *Hewitt v. Schultz* (Pages 27-32 of this brief, or *S. P. v. Bell* (Pages 32-34 of this brief)), which is what this Court will have to do to find for appellant.

Subsequent court proceedings are found in *41 F. Supp.* 273.

#### 6. Summary.

The act of July 2, 1864, granted every alternate, odd numbered section in the Territory of Montana located within a strip forty miles wide on either side of the definitely fixed line of road providing they were not mineral in character, and were not settled upon or preempted on that date. Those lands are commonly known as the "place lands." Title to such lands vested in the railroad company in praesenti as of July 2, 1864. Those lands and those lands alone were embraced within the language "hereby granted" appearing in that act.

The Joint Resolution of May 31, 1870, made a new and additional grant of lands between Portland and Puget Sound on the same terms as the original charter. It granted every alternate odd numbered section located within a strip 40 miles wide in the Territory of Washington, and 20 miles wide in the State of Oregon, between Portland and Puget Sound, on either side of the definitely fixed line of road, providing they were not mineral in character, and were not settled upon or preempted before that date. Those lands are likewise commonly called



"place lands". Title to those lands vested in the company in praesenti as of May 31, 1870. Those lands and those lands alone were embraced within the language "hereby granted" appearing in the settlement and preemption proviso of that resolution.

No title to any lands in Montana, indemnity or otherwise, was acquired by the company under the Joint Resolution. Title to all lands in Montana was grounded in the act of July 2, 1864.

In any event, we can paraphrase the settlement and preemption proviso of the Joint Resolution relied upon by appellant and it will read:

"Provided that all 'place lands' between Portland and Puget Sound \* \* \* shall be subject to settlement and preemption like other lands \* \* \*."

Appellee is entitled to a judgment on the merits.

#### *B. Answer To Argument Of Appellant In His Brief.*

We agree that a summary judgment should only be granted where there is no genuine, material issue of fact. (*App. Br., Pp. 17-19*). In this case all facts pertaining to the ownership of the mineral fee are fully developed and undisputed.

##### *1. Nature And Effective Date of the Original Grant of July 2, 1864. (App. Br., Pp. 21-23)*

Appellant quotes an excerpt out of context from the case of *St. Paul & Pac. R. Co. v. N. P.*, 1891, 11 S. Ct. 38 139 U.S. 1, 35 L. Ed. 77. The full decision reflects that the court held that the language in Section 3 'that there be, and hereby is granted', indicated that the property itself passed and not any special or limited interest in it;

that there was a transfer of a present title as of the date of the grant; that the patents issued were confirmation and assurance of the fulfillment of the grant as of the date of the grant.

See also: *Nelson v. N. P.*, 1903, 23 S. Ct. 302  
188 U.S. 108, 47 L. Ed. 406;

*N. P. v. Townsend*, 1903, 23 S. Ct. 671,  
190 U.S. 267, 47 L. Ed. 1044;

*U. S. v. N. P.*, 1904, 24 S. Ct. 330,  
193 U.S. 1, 48 L. Ed. 593;

*U. S. v. N. P.*, 1920, 41 S. Ct. 439,  
256 U.S. 51, 65 L. Ed. 825;

*U. S. v. N. P.*, 1940, 61 S. Ct. 270,  
311 U.S. 317, 85 L. Ed. 210; see later  
action in 41 F. Supp 273.

2. *The Joint Resolution of 1870 Constituted  
A Grant of New Title To The "Place Lands"  
In Montana.* (App. Br., Pp. 23-27)

We will not repeat the argument above which fully covers the situation. The *Land Grant Case* (*U.S. v. N.P.*, 1940, 61 S. Ct. 264, 311 U.S. 317, 85 L. Ed. 210) does not hold as inferred by appellant. It holds that the settlement and preemption proviso applies to the "lands granted by the Resolution"; that is, to the "place lands" between Portland and Puget Sound.

Appellant argues that the railway company and land department by the form of Place List recognized the application of the proviso to "place lands" in Montana.

The sole purpose of the Place List was to identify those lands to which defendant railway company claimed title, and for which it desired patent, to obtain the land

office certificate, and ultimately to obtain the patent. No consideration whatsoever of the settlement and preemption proviso, or its applicability, or its non-applicability, was involved. There was no reference whatsoever to the settlement and preemption proviso. Appellant admits the certification of facts by the land office on the "place list"—that is, that section 23 was within the "place limits", was surveyed land, and wholly unclaimed by any other persons. The suggested inference is not reasonable and is not warranted.

In determining the title which passed, and when it passed, we are governed by the statutes and the facts that do or do not bring the land within the statutes. Under the undisputed facts, title to Section 23 under the Supreme Court decisions vested in the defendant railway company in praesenti by the Act of 1864. Furthermore, under the Supreme Court decisions, the settlement and preemption proviso of 1870 did not apply to such lands.

3. *By Virtue Of The Proviso Of The Joint Resolution Of 1870, The Purported Mineral Reservation Of The Northern Pacific Railway Company Is Void (App. Br., Pp. 27-33).*

- a. *The Proviso Conferred No Rights On Appellant Or His Predecessor In Title and Interest, and Could Not Invalidate The Exception and Reservation of Minerals in Appellee Railway Company's Conveyance To Stubrud.*

The language of the proviso is this:

*"Provided, that all lands hereby granted to said*

company, which shall not be sold or disposed of, or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like all other lands, at a price to be paid to said company, not exceeding two dollars and fifty cents per acre."

Appellant's predecessor in title and interest contracted to purchase, and thereafter obtained, a deed to all of said Section 23, Township 17 North, Range 53 East, M.P.M., Dawson County, Montana, subject to an express exception and reservation of the minerals. Obviously he could not have acquired this section of land by "settlement and pre-emption like all other lands", because the homestead laws limited settlers to one quarter section of unappropriated public lands, and provided that "no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law." (*R.S. Sec. 2289; March 3, 1891, c. 561, Sec. 5, 26 Stat. 1097, 43 U.S.C.A. Sec. 161*). It is difficult to understand, therefore, how appellant, or his predecessor, can possibly maintain the position that anything in the proviso of the Joint Resolution entitled him to purchase the entire section, including the minerals, and rendered void the exception and reservation of the minerals by the Railway Company. If the sale itself was not violative of the proviso (assuming, for the sake of argument, that the land in question was subject to the proviso), how could the ex-

ception and reservation of the minerals violate the proviso?

The proviso, obviously, is not self-executing, and it does not purport to confer rights on anyone but the United States. The lands subject to the proviso were granted to the Railroad Company in fee, but subject five years after completion of the entire road "to settlement and pre-emption like all other lands." Since other lands subject to settlement and preemption were only unappropriated public lands, the proviso was nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws, with an implied covenant on the part of the Railroad Company to permit such disposition. While a refusal to open lands subject to the proviso to preemption and settlement at the expiration of the five-year period, would constitute a breach of the Company's contract with the United States, only the United States could complain thereof. This was so decided in *Oregon & Cal. R. R. v. United States*, 238 U.S. 393, at pages 431-436, 35 S. Ct. 908, 59 L. Ed. 1360, in respect of a much more specific proviso "That the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding two dollars and fifty cents per acre."

Nothing contained in the proviso of the Joint Resolution of May 31, 1870, purports to prevent the Railroad Company from selling lands for such price and upon such terms as may be agreed, to persons not possessing

the qualifications of a preemptor, or who might not wish to preempt or occupy them, or might desire to purchase more land than could be acquired by settlement and pre-emption. In *Union Pacific R. Co. v. McShane*, 24 Fed. Cas. p. 640 (Case No. 14,382), the Circuit Court for the District of Nebraska construed a substantially identical proviso in Section 3 of the Act of July 1, 1862, granting lands to the Union Pacific Railroad Company, as follows:

"I am inclined to consider the true meaning and effect of the provision in question to be this: While the road is being constructed and for a period of three years after the completion of the entire line, the company may sell or dispose of the lands at their own price, and they are subject during this period to no right of settlement or pre-emption; after three years have elapsed, the company may still sell or dispose of their lands in good faith, but as to any lands not thus sold or disposed of, there is a right on the part of the public to settle upon and pre-empt them in the same manner as if they were part of the public domain—the price not exceeding \$1.25 per acre, being payable to the company instead of the government.

"This view harmonizes and gives effect to all the different provisions of the act. The right of the company to the lands granted is a substantial one. The title passes to the company. Patents are required to be issued to the company conveying the 'right and title to the lands'. During the three years the right of the company to sell at its own price is clear, and has not been denied. After the three years the title does not change. The company still owns the lands, but 'subject' to the right of any person possessing the qualifications of a pre-emptor, to settle upon them and obtain them as a pre-emptor may obtain other public lands. But this right does not prevent the company from selling lands in good faith to

persons who may not wish to pre-empt or occupy them. The rights intended to be given to the public are secured and the evils apprehended from the company having a monopoly of such a vast amount of lands, are avoided by this construction—which recognizes the right of the actual settler to pre-empt the lands, and thus destroy the monopoly, and also the right of the company actually and in good faith, to sell any tract not at the time pre-empted, and which, if sold, likewise destroys to that extent the monopoly, since a sale of lands is usually the first step towards their settlement and cultivation.”

The question in the case was whether the reserved rights of the United States under the proviso rendered the lands exempt from State Taxation. The court held the lands subject to the proviso not exempt, and was affirmed by the Supreme Court in *Railway Company v. McShane*, 22 Wall. 444, 22 L. Ed. 747. That court said:

“The road was completed and accepted by the President in May, 1869, and these lands have been subject to such pre-emption since three years from that date, if this right can be exercised by the settler without further legislation by Congress, or action by the Interior Department. We do not now propose to decide whether any such legislation or other action is necessary, or whether any one, having the proper qualification, has the right to settle on these lands and, tendering to the company the dollar and a quarter per acre, enforce his demand for a title. It is not known that any such attempt has been made, or ever will be, or that Congress or the department has taken, or intends to take, any steps to invite or aid the exercise of this right. It would seem that if it exists, it would not be defeated by the issue of the patent to the company, and it may, therefore, remain the undefined and uncertain right, vested in no particular person or persons, which it now is, for an

indefinite period of time. The company, meantime, obtains the title, sells the lands when a good offer is made, and exercises all the other acts of full ownership over them, without the liability to pay taxes.

“We are of opinion, therefore, that this right confers no exemption from taxation, whether the land be patented or not; and so far as the opinion in the case of *Railway Company v. Prescott* asserts a different doctrine, it is overruled.” (*Pp. 461, 462.*)

As a matter of interest, it may be noted that Northern Pacific Railroad Company did not open the lands granted by the Joint Resolution to preemption and settlement at the expiration of five years from the completion of the entire road, because those lands remained subject to the mortgages authorized by the Resolution, and it construed the proviso as subjecting to settlement and preemption only lands which did not then remain subject to the mortgage, as appeared to be the plain meaning of the proviso; that the Commissioner of the General Land Office took the position that there was no authority in the officers of the Land Department of the United States to issue regulations providing for the entry under any of the public land laws of lands which had been earned by the Railway Company, or to accept payment for the lands, or to allow entry thereof, and was sustained by the First Assistant Secretary of the Interior in *38 Land Decisions 77*; that the Supreme Court of the United States held that failure to open lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire road in 1887, whether the lands were then subject to the mort-



gage, or not, was a breach of its contract with the United States, and that the Government was entitled, if it could, to prove any damage to it, or advantage to the Company, which resulted from this breach of contract, (*U. S. v. N. P. Ry. Co.*, 311 U. S. 317, 368), and that thereafter a compromise settlement was effected, with the approval of the court, under which the Company relinquished its claim to additional lands, and compensation for lands, and consented to judgment against it and in favor of the Government for three hundred thousand dollars, and the Government relinquished its claims against the Company (*U. S. v. N. P. Ry. Co.*, 41 F. Supp. 273). Obviously, the failure to open the lands granted by the Resolution to preemption and settlement at two dollars and fifty cents per acre, could not entitle purchasers to relief when it was held to warrant a recovery of damages by the United States.

It is clear from the undisputed record that if the doctrine of contract for benefit of third persons were applicable in this case, appellant who acquired by deed in 1944 following a foreclosure sale, and Stubrud who acquired the surface fee only in 1917 as an assignee of a contract vendee, and MaBelle Cobb who acquired the surface fee only in 1909 as a contract vendee, were not settlers or preemptors and not within the class contemplated by the proviso.

They could not qualify as settlers or preemptors because their acreage exceeded the amount allowed under the "homestead laws". The plain language of the resolu-

tion is that it shall be opened to settlement and preemption "like all other lands". By this language, the Resolution does specify the circumstances under which such lands are subject to settlement and preemption—that is, "like all other lands", or to put it in the only other language it could mean, "in accordance with the requirements of the homestead laws." Since they could not qualify in any event because of the violation of the acreage requirements of the homestead laws, they could not have been within the class of settlers or preemptors referred to in the proviso.

Further in this connection, there was no attempt on their part to come within the class of settlers or preemptors contemplated by the proviso. Never was there any claim or entry filed in the land office. Frequent decisions of the Supreme Court of the United States have held that no preemption or homestead claim attaches to a tract of land until the filing of an entry in the land office.

Thus, in the case of *Railway Co. v. Dunmeyer*, 113 U. S. 629, 644, 5 Sup. Ct. 566, 573, 28 L. Ed. 1122, Mr. Justice Miller, speaking for the court, said:

"Of all the words in the English language, this word 'attached' was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated. It meant that, by such a proceeding, a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language was quoted, and the decision reaffirmed, in *Railroad Company v. Whitney*, 132 U. S. 357, 33 L. Ed. 363, 10 Sup. Ct. 112; *Whitney v. Taylor*, 158 U. S. 85, 39 L. Ed. 906, 15 Sup. Ct. 796. In *Lansdale v. Daniels*, 100 U. S. 113, 116, 25 L. Ed. 587, it was ruled that "such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose." See, also, *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527.

Not only were appellant's predecessors not within the class of settlers and preemptors contemplated by the proviso because they were not qualified, but likewise they did not purport to even try to come within the class.

Furthermore, appellant's argument that the proviso was a mandate to sell to settlers, and that it therefore follows that purchasers were entitled to the benefits of the proviso, flies directly in the face of two decisions of the Supreme Court of the United States.

There is no dispute over the mandatory language of the grant involved in the case of *Oregon and C. R. Co. v. United States*, 238 U. S. 393, 35 S. Ct. 908, 59 L. Ed. 1360, in which the United States had filed a complaint to declare a forfeiture of unsold lands in a railroad grant. The sale proviso in that grant provided:

"That the lands granted by the act aforesaid (act of 1866) shall be sold to actual settlers only, in quantities not greater than one quarter section to

one purchaser, and for a price not exceeding two dollars and fifty cents per acre;' " (35 S. Ct. at 913)

From that standpoint, the difference in statute involved, the case is not helpful to appellant. The holding of the court likewise does not help appellant. Cross-complaints were filed by actual settlers involving the following:

"The cross complainants alleged that they were actual settlers upon the lands granted by the act of May 4, 1870, long prior to the institution of any suit or the assertion of any claim of forfeiture by the government; \* \* \* and both cross complaints and petitioners respectively alleged in substance that the lands were granted in trust to the respective grantee companies for actual settlers or those who should become such, and alleged respectively tender of the purchase price, demand for conveyances and the refusal of the railroad company to accept the tender or make the conveyances. And both cross complainants and interveners asserted a prior right to the extent of the land demanded by them, respectively; denied that the grants had become forfeited, and resisted the relief prayed by the government. They adopted in all other particulars the allegations of the bill, and relied upon them as the basis of their respective claims; prayed that the railroad company be decreed to hold in trust the legal title to the land respectively claimed by them, that their several rights be established and enforced, and that the railroad company be directed to convey to each of them the tract of land applied for by each, and for general relief. \* \* \*

"Demurrers were sustained to the cross complaints and to the petitions in intervention." (35 S. Ct. at 911)

With respect to those claims, the Supreme Court of the United States decided:

"The provisos of the act having been thus established as covenants, not conditions subsequent, between the government and the defendants, and their continuing obligation determined, we are brought to the consideration of the rights of the cross complainants and interveners thereunder.

"It may be said that in some of the aspects of our discussion there was implication against their contentions, but it also may be said there is implication for them. Undoubtedly the provisos expressed the policy of the settlement of the lands and a sale to settlers, but the cross complainants and interveners assert a right more definite—a trust, indeed, and personal—of compulsory obligation upon the railroad company, to be enforced in individual suits. \* \* \*

"Nor need we pause to consider the differences between charitable trusts and other trusts, the class, not individual interest, which the former must have, as it is contended, and the certainty in the beneficiaries which the cases have assigned to the latter. And certainly the words 'actual settlers' indicate no particular individuals. They describe a class or body of individuals without habitation or name. As Judge Wolverton, in his opinion in the district court (186 Fed. 861, 910), said: 'There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a cestui que trust under the theory until and unless he becomes such a settler. This is a palpable demonstration of the uncertainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land?' We cannot construe the grants as confined or encumbered by rights so indefinite.

"There was a complete and absolute grant to the railroad company with power to sell, limited only as prescribed, and we agree with the government that the company 'might choose the actual settler; might sell for any price not exceeding \$2.50 an acre; might sell in quantities of 40, 60, or 100 acres of any

amount not exceeding 160 acres.' And we add, it might choose the time for selling or its use of the grants as a means of credit, subject ultimately to the restrictions imposed and we say 'restrictions imposed' to reject the contention of the railroad company that an implication of the power to mortgage the lands carried a right to sell on foreclosure, divested of the obligations of the provisos." (35 S. Ct. at 923-925).

In that case actual settlers were refused their right to enforce a sale and purchase under the settlement and sale proviso admittedly applicable to the granted lands involved.

That decision was referred to for comparison by the Court with reference to the Northern Pacific grant in *U. S. v. N. P.* (1940), 61 S. Ct. 264, 311 U. S. 317, 85 L. Ed. 210, referred to above when the court said:

"We hold, contrary to the Government's assertion, that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. *We hold further that the company was not a trustee of the lands* for the United States either in its own right or *in behalf of possible settlers*. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of lands." (61 S. Ct. at 287)

The Supreme Court in a third case has held that only the United States has a cause of action to question the title conveyed by a patent. The Court said in *Burke v. Southern Pacific*, 34 S. Ct. 907, 234 U.S. 669, 58 L. Ed. 1527:

"In the last case this court said, speaking through Chief Justice Marshall: 'It is not doubted that a patent appropriates land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, *and has always been held conclusive against all those whose rights did not commence previous to its emanation \* \* \**'"

(34 S. Ct. 916).

In this connection that the position taken by appellant is without authority is reflected in his brief:

"See *Krutzfeld v. Stevenson, et al*, 86 Mont. 463, 284 Pac. 553, wherein it was held that where a vendor executed a deed to an interest in oil land and received an adequate consideration therefor, he could not come into a court of equity to evade his obligation on the ground that the deed did not convey what he had agreed to convey, but the court would consider as done that which should have been done, and sustain the transaction. In this case the defendant Railway Company cannot escape its obligation upon the ground that the deed does not convey what it had bound itself to convey by the acceptance of the Joint Resolution of 1870." (*App. Br., Pp. 29*)

It is undisputed that the contract for deed between MaBelle Cobb and defendant railway company executed in 1909 contained an express exception and reservation of all minerals. That contract was recorded June 2, 1917, when assigned by MaBelle Cobb. Millard Stubrud having succeeded to MaBelle Cobb's interest under the contract, the railway company in 1918 conveyed by deed to Millard Stubrud and the deed contained the same express exception and reservation of all minerals. That deed was recorded in 1918. No one contends that the deed to Stubrud did not contain everything it contracted to con-

vey. The case cited is simply not pertinent under the undisputed facts.

Appellant, however, who acquired his rights under a special warranty deed in 1944 following a foreclosure sale, now claims that the defendant should have conveyed in 1918 something that MaBelle Cobb and Stubrud did not contract to buy.

We respectfully submit that under the undisputed facts, and the Supreme Court decisions referred to, the contract was not for the benefit of this appellant, the railway company did not acquire title to the land as a trustee for this appellant, and appellant has no standing legally or equitably to assail the title out of which his rights are carved.

b. *Sale of the Land to Appellee Railway Company, Upon Foreclosure of the Mortgages of the Railroad Company, Was a Disposal of the Lands Within the Meaning of the Joint Resolution, and They Could Not Thereafter Be Subject to the Proviso.*

The Joint Resolution of 1870, plainly contemplates that the requirement that the land thereby granted shall be subject to settlement and preemption at a price to be paid the Company, not exceeding two dollars and fifty cents per acre, shall not apply to or survive a sale of the lands upon the foreclosure of the mortgage thereby authorized, for it expressly provides that in such event "such lands shall be sold at public sale at places within the states and territories in which they shall be situate



after not less than sixty days' previous notice, *in single sections* or subdivisions thereof, *to the highest and best bidder.*" (Emphasis ours.) Sales in single sections to the highest and best bidder are manifestly inconsistent with settlement and preemption of the lands in subdivisions not exceeding one hundred and sixty acres for two dollars and fifty cents per acre. The complaint shows, on its face, (paragraph IV) "that the said Northern Pacific Railroad Company took advantage of the provision of the said Joint Resolution of Congress of May 31, 1870, and mortgaged the lands and selection rights granted by the said Joint Resolution and the said Act of July 2, 1864; that the said Northern Pacific Railroad Company defaulted in the payments to be made upon the bonds secured by said mortgage, and, in a foreclosure action commenced in the United States Circuit Court, District of Montana, on or about the 7th day of August, 1893, the said lands and rights of the Northern Pacific Railroad Company were sold to the defendant Northern Pacific Railway Company \* \* \*." It is plain that thereafter the proviso of the Joint Resolution ceased to have any application.

*Heath v. Northern Pacific Railway Company*, 38 *Land Decisions* 77, was an appeal from a decision of the Commissioner of the General Land Office, July 17, 1909, holding "that by reason of regular proceedings had in the courts whereby all the property of the Northern Pacific Railroad Company, including the land grant, was sold to the Northern Pacific Railway Company, the

lands granted to the company are no longer subject to the provision (the proviso of the Joint Resolution of 1870) relied upon by the appellant." The First Assistant Secretary of the Interior affirmed the action of the General Land Office in rejecting Heath's homestead application, upon the ground that the Interior Department was without jurisdiction in the premises, but intimated that the sale under the foreclosure proceedings operated as a disposal of the lands within the meaning of the Joint Resolution, "because under those proceedings all the lands which had been patented to or selected by the company were ordered to be sold in the manner prescribed by the terms of the joint resolution, and evidence has been submitted on behalf of the company showing that the land involved herein was sold in accordance with the decree."

It affirmatively appears upon the face of the complaint, therefore, that at the time of the purchase of the lands here in controversy by appellant's predecessor in title and interest, those lands were not subject to the proviso relied upon by appellant.

*c. The Mortgage Foreclosure Proceedings*  
(*App. Br., Pp. 31*)

Appellant now attacks collaterally the validity of the foreclosure sale of 1896.

He not only cites no authority, but his position is directly contrary to the allegations of Paragraph IV of his complaint admitted in Paragraph IV of the Answers (*T, Pp. 5, Comp. Par. IV; T, Pp. 23, Ans. Par. IV; T.*

*Pp. 43, Ans. Par. IV*). Appellant is bound by these allegations:

*Weatherman v. Reid*, 62 Mont. 522,  
205 Pac. 251;

*Anderson v. Mace*, 99 Mont. 427,  
45 P. (2d) 771;

*Bancroft's Code Pleading, Ten Year  
Supplement*, 272, Sec. 520.

In any event how does this defect, if any, help this appellant? The foreclosure sale was in 1896. Patent issued to this defendant in 1902. We take the position that the issue of the patent confirms the fulfillment of the grant, including the validity of the foreclosure sale, is conclusive evidence of the title of the appellee railway company to the entire fee, and is not vulnerable to collateral attack. Appellant's position depends on the validity of the patent. It is difficult to find any consistency or relevancy in this argument concerning the validity of the foreclosure sale in 1896, when patent issued in 1902, and when appellant depends upon the validity of the patent and the validity of the title of appellee railway company as the primary source of his rights. In what possible way could this defect, if it exists, convey any right in the severed mineral fee in 1944 or 1952 to the appellant?

Furthermore, the Supreme Court of the United States and Congress have flatly disagreed with appellant. In the *Forest Reserve Case*, 1920, 41 S. Ct. 439, 256 U. S. 51, 65 L. Ed. 825, the court said:

"The lands in question are within the indemnity limits of the land grant made to the Northern Pa-

cific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the joint resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other." (41 S. Ct. at 439)

The Act of June 25, 1929, 46 Stat. 41, 43 U.S. C., Sec. 921-929, and the Land Grant Case that resulted, *U. S. v. N. P.*, 1940, 61 S. Ct. 264, 311 U. S. 317, 85 L. Ed. 210, and the subsequent disposal of the case in 41 F. Supp. 273, likewise resolve the issue.

## II. APPELLANT IS ESTOPPED FROM QUESTIONING THE VALIDITY OF THE MINERAL RESERVATION.

Certified copy of the patent issued to appellee railway company is filed as an exhibit in this case. The Supreme Court of the United States has long since decided that it conveys the mineral fee as well as the surface fee.

*Burke v. Southern Pacific* (1914),  
34 S. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527

*United State v. Illinois Central R. Co.*,  
7th C.C., January 18, 1951, 187 F. (2d) 374,  
adopting an excellent opinion by the District Court in 89 F. Supp. 17.

After the United States issued the patent to defendant railway company which included the minerals as well as the surface, MaBelle Cobb contracted to buy the surface only, the contract excepting and reserving to defendant railway company the minerals. Millard Stubrud, as

assignee of MaBelle Cobb, received a deed from defendant expressly excepting and reserving the minerals. Appellant is a successor in interest to Millard Stubrud.

The only source of title upon which Mabelle Cobb, Stubrud, and now appellant claim their title is the original deed from the appellee. They are estopped from questioning the validity of the mineral reservation.

(1) "A grantee, and those claiming under him cannot deny the binding authority of a reservation or exception in the deed \* \* \*." (19 *Am. Jur.* 624, *Sec.* 26).

(2) "F. Exceptions or Reservations.

Ordinarily a grantee in a deed will be concluded by recitals therein making exceptions or reservations in favor of the grantor or a third person unless he claims the reserved interest under an independent title." (31 *C.J.S.* 218, *Sec.* 38 (f).)

(3) See also the following:

*Wier, et al v. Texas Co.*, (1950) *La.*,  
5th *C.C.*, 180 *F.* (2d) 465;

*Ambarann Corp. v. Old Ben Coal Corp.*,  
(1946), *Ill.*, 69 *N.E.* (2d) 835;

*Greene v. White, Texas*, (1941),  
153 *S.W.* (2d) 575;

*Studebaker v. Beek, Wash.*, (1915),  
145 *Pac.* 225;

*Midkiff v. Colton*, 4th *C.C.*, *W. Va.*,  
(1918) 252 *Fed.* 420.

(4) Montana recognizes that a grantee who claims title under a deed is estopped by its recitals. He is not estopped to claim under a different source of title which is paramount. Nevertheless, he cannot claim title under

a deed, and at the same time deny the validity of its recitals or reservations.

*Hart v. A.C.M. Co., (1924), Mont., 69 Mont. 354, 222 Pac. 419.*

It is elementary that plaintiff must succeed on the strength of his own title.

*Hinton v. Staunton, (1950), 124 Mont. 534, 228 P. (2d) 461.*

Where in this case is there a single fact disclosing any basis for a claim of title to these minerals in plaintiff? It is conceded that MaBelle Cobb contracted to purchase only the surface rights. It is conceded that Stubrud, assignee of MaBelle Cobb, acquired only the surface rights. It is conceded that plaintiff is a successor in interest to Stubrud acquiring, accordingly, only what Stubrud had to convey.

There is no conveyance of the minerals to the appellant by the United States, by defendant railway company, nor by anyone else. Appellant on his own allegations is literally an interloper in the chain of title to the minerals. He discloses no basis whatsoever for any claim to them.

Appellant's rights stem from a deed containing a mineral exception and reservation. He is estopped from denying its validity.

### III. APPELLANT'S PRETENDED FIRST CAUSE OF ACTION IS, IN ANY EVENT, BARRED BY LIMITATIONS.

As hereinbefore demonstrated, the proviso in the Joint Resolution of May 31, 1870, pleaded in the com-

plaint, is not self-executing, and if purchasers of lands subject thereto could have any rights whatsoever thereunder, such rights were enforceable only by some appropriate proceeding in a court of equity. While plaintiff is not here asserting any equitable title to the minerals, nor is he seeking to have defendant Railway Company declared a trustee of the minerals for him, it may be noted that such an action was long ago barred by *Sec. 93-2613 M.R.C., 1947*, which provides that "an action for relief not hereinbefore provided for must be commenced within five years after the cause of action shall have accrued." *Mantle v. Speculator Mining Company*, 27 Mont. 473, 71 Pac. 665; *Kimes v. Northern Pacific Railway Company*, 49 Mont. 573, 575; 144 Pac. 156.

Legal title to the minerals in the lands in controversy appears, on the face of the complaint, to be vested of record in defendant Railway Company. *Secs. 93-2504, 2505, and 2507 R.C.M., 1947*, provide as follows:

93-2504: "*Seizin within ten years—when necessary in actions for real property—action for dower.* No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within ten years after the death of her husband."

93-2505: "*Such seizin, when necessary in action or defense arising out of title to or rents of real property.* No cause of action, or defense to an action, arising out of the title to real property, or to rents

or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within ten years before the commencement of the act in respect to which such action is prosecuted or defense made."

93-2507: "*Possession—when presumed—occupation deemed under legal title, unless adverse.* In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for ten years before the commencement of the action."

As owner of record of the legal title to the minerals in question, defendant Railway Company must be presumed to have been possessed thereof at all times since prior to the conveyance of Section 23 to plaintiff's predecessor in title and interest, and the occupation of the premises by plaintiff and his predecessors must be deemed to have been under and in subordination to the legal title held by defendant Railway Company, there being no allegation that plaintiff has at any time held or possessed the minerals in said Section 23 adversely to defendant's legal title thereto. Since the complaint shows, on its face, that the record title to the minerals is and at all times since 1898 has been in defendant Railway Company, neither plaintiff nor his predecessors in title and interest was



seized or possessed of the minerals in question within ten years before the commencement of this action, or within ten years before the making by defendant Railway Company of the oil and gas lease to defendant Texas Company, or the entry of the Texas Company upon the premises thereunder, and the pretended first cause of action set forth in his complaint is barred by limitations.

#### IV. APPELLANT'S CLAIM IS BARRED BY LACHES.

Since recording the deed from appellee to Stubrud in 1918, appellant and his predecessors in interest have stood idly by until there was a tremendous increase in value of the mineral fee. During all that time appellee was assessed and paid the taxes on its right of entry. Appellee entered into contractual obligations. Appellant is barred by laches.

*Lewis v. Bowman*, 113 Mont. at 80,  
121 P. (2d) 162;

*O'Hanlon et al v. Ruby Gulch Mining Co.*,  
64 Mont. 318, 209 P. 1062;

*Riley v. Blacker*, 51 Mont. 364, 152 P. 758;

*Montgomery v. Bank of Dillon*, 114 Mont.  
at 408, 136 P. (2d) 760;

*Hynes v. Silver Prince Min. Co.*,  
86 Mont. 10, 281 P. 548;

*Johnson v. Opheim*, 67 Mont. 126,  
214 P. 951;

*Harrington v. Butte & Superior Co.*,  
52 Mont. 263, 157 P. 181;

*Kavanaugh v. Flavin*, 35 Mont. 133,  
88 P. 764;

*Morrison v. Jones, 31 Mont. 154,  
77 P. 507.*

## CONCLUSION

We respectfully submit that the facts are all developed and undisputed; that the legislative history of the Joint Resolution of 1870, the decisions of the federal land department, and the decisions of the United States Supreme Court, clearly indicate that the settlement and preemption proviso of the Joint Resolution of 1870 applied only to "place lands" between Portland and Puget Sound, and did not affect any lands in Montana, whether "place lands" or "indemnity lands." The summary judgment must be affirmed.

Respectfully submitted,

COLEMAN, JAMESON & LAMEY

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Of Counsel:

M. L. Countryman, Jr.

Robert P. Davidson

No. 14,983

IN THE

**United States Circuit Court of Appeals**

**FOR THE NINTH CIRCUIT**

THEODORE B. RUSSELL,

*Appellant,*

—vs—

THE TEXAS COMPANY, a corporation,  
FREDERICK T. MANNING DRILLING COMPANY,  
a corporation, and  
THE NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Cross-Appellant,*

—vs—

THEODORE B. RUSSELL,

*Cross-Appellee.*

**BRIEF OF APPELLEE AND CROSS-  
APPELLANT, THE TEXAS COMPANY**

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Filed ....., 1956

....., Clerk

**FILED**

**JUL -2 1956**



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*Hume v. U. S.*, 10 S. Ct. 134, 132 U. S. 406;

*U. S. v. Chandler-Dunbar Water Power Co.*, 33 S. Ct. 667, 229 U. S. 53;

*U. S. v. Miller*, 63 S. Ct. 276, 317 U. S. 369;

#### 2. Circuit Court of Appeals.

*Continental Land Company v. U. S.*, 9th C. C., 88 F. (2d) 104;

*U. S. v. Boston Etc. Canal Co.*, 1st C. C., 271 Fed. 877;

*U. S. v. Noble*, 9th C. C., 79 F. (2d) 342;

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*City of Missoula v. Mix*, 123 Mont. 372, 214 P. (2d) 212;

*Connolly v. Harrel*, 102 Mont. 295, 57 P. (2d) 781;

*Doney v. Beatty*, 124 Mont. 41, 220 P. (2d) 77;

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*Herbert v. Lankersheim, Cal.*, 71 P. (2d) 221;

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13-301;

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13-318;

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17-201;

17-402;

17-607;

67-1518;

89-801;



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT  
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THEODORE B. RUSSELL,

*Appellant,*

—vs—

THE TEXAS COMPANY, a corporation,  
FREDERICK T. MANNING DRILLING COMPANY,  
a corporation, and  
THE NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Cross-Appellant,*

—vs—

THEODORE B. RUSSELL,

*Cross-Appellee.*

---

**BRIEF OF APPELLEE AND CROSS-  
APPELLANT, THE TEXAS COMPANY**

---

There are two basic questions involved in this appeal—first, the question of the ownership of the minerals in the land, and the right of entry upon the surface for the purpose of mining the minerals; and secondly, the question of the damages to which the appellant Russell is entitled from The Texas Company arising out of such mining.

In this brief we make no mention of the contention of appellant Russell as to the ownership of minerals in Section 23, or

of the basic right of the defendants to enter upon the section for the purpose of mining the oil, for the reason that such question is fully considered in a separate brief of the appellee Northern Pacific Railway Company, which is filed herein. This brief shall be devoted to the question of the damages to which the appellant Russell is entitled arising out of such mining.

## SUMMARY OF EVIDENCE

Defendant Railway Company entered into a contract for deed November 30, 1909, recorded June 2, 1917, containing a mineral exception and reservation (*Tr. pp. 57-58, and Exhibit*). On June 14, 1918, pursuant to the contract, defendant Railway Company conveyed the land to one Millard Stubrud, the deed being recorded June 26, 1918, which contained this mineral exception and reservation in part. After reserving all minerals, the deed provided:

“\* \* \* together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon; \* \* \*” (*Tr. pp. 59-60*).

Russell acquired the land in 1944 by a special warranty deed from Blossom (*Stipulation, Tr. p. 58, and Exhibit*). Since 1944, Russell has at all times leased the surface to one Bert Ekland who has used it for grazing (*Tr. p. 223*). The annual rentals received by Russell were cash in the sum of \$75 for each year from 1948 through 1951, and \$100 for 1952 and 1953, and Ekland kept the fences in repair (*Tr. pp. 65-66*).

Defendants Exhibits 11 through 26 give a good representation of the S½ of the section of land involved, and the surface

topography, and the general surface condition (*Tr. pp. 214-215*). The N½ not shown is badland. (*T, 224*). Lillis classified the section as "a grazing section not suitable for farming", and that it is typical open range country (*Tr. pp. 187-188*). An attempt was made to farm between 70 and 80 acres of the section on each of two years prior to 1920 (*Tr. p. 223*). Except for that attempt at farming, the land has been continuously used for grazing purposes since 1916, and has been dry land, rough land, suitable only for pasturage, and used only for grazing. It was in general rough, waterless, unirrigated, uncultivated, open range, grazing land. (*Tr. pp. 187-188; Tr. pp. 222-225*). Defendant The Texas Company constructed a dam, or reservoir, which increased the usability of the section for grazing purposes, and increased the value of the section for grazing purposes. (*Tr. pp. 192-193; Tr. p. 225*). Except for the reservoir, there was no water, surface water, or other water capable of being used for drilling purposes (*Tr. p. 178*); there was one small spring which gave a small trickle in the southwest corner of the section, but no other water sources except flowing surface water following a rain (*Tr. pp. 191-192; Tr. pp. 224-225*).

Ekland, who owned, lived upon, and ranched adjacent sections, since 1916, and had used section 23 involved practically from 1916 to the date of the trial, and who had leased the section from Russell from 1944 to the date of the trial, expressed his opinion that the surface of the land was worth \$7 to \$8 per acre (*Tr. p. 227*). Lillis had spent a portion of one day only on the property on April 14, 1955 (*Tr. p. 176*). He was not familiar with the market value of the land in 1952, nor with any grazing lands in Dawson County, made no inquiries of any kind in Dawson County with real estate men, nor local stockmen, nor with anybody familiar with the land to ascertain its market

value (*Tr. pp. 190-191*). He expressed his opinion that the value of the land at the time of trial from the standpoint of useful grazing for stock purposes was \$10 to \$15 per acre (*Tr. p. 189*).

The extent to which the defendants used the surface of the land, both rightfully and wrongfully, is undisputed. Defendants commenced their mining operations on Section 23 on March 14, 1952 (*Q. 1, and answer thereto, Pl. Ex. 8-9*).

Actual survey by the witness Traver disclosed the use of a total area on Section 23 of 948,414 sq. ft., or 21.76 acres (*Tr. pp. 209-216, Pl. Ex. 3, Ex. A; Def. Ex. 27*). Lillis testified he roughly checked the figures and they were substantially correct (*Tr. p. 177*), but he added some additional acreage which he thought had not been included, and his estimate of the total acreage used was 24½ acres (*Tr. pp. 177-178*).

The only portion of the entire area wrongfully used as an access to adjacent sections is marked out in parentheses on roads 1 and 16 in defendants Exhibit 27 (*Tr. pp. 214, 216*). Road 16 was commenced on October 6, 1952, (*Q. 3, Ans. 3, Pl. Ex. 8-9*), and its wrongful use terminated on November 22, 1952 (*Q. 4, Ans. 4, Pl. Ex. 8-9*). The entire area wrongfully used was 68,125 sq. ft. or, since there are 43,560 sq. ft. in one acre, a total of 1.5 acres (*Def. Ex. 27 as corrected, Pl. Ex. 3, Ex. A*). In connection with road 1, defendants wrongfully used .303 acres between September 3 and November 22, 1952 (*Q. 2, Ans. 2, Pl. Ex. 8-9; Q. 4, Ans. 4, Pl. Ex. 8-9; Def. Ex. 27, as corrected; Tr. pp. 208-220*). In other words, defendants wrongfully used roads as an access to other lands totalling 1.863 acres for a total period of time of about two months.

Defendants objected to the testimony of Lillis with respect to the value of use of roads, and the initial objection is set out at page 180 of the transcript. Lillis was then permitted to testify

over objection, with the court reserving its ruling (*Tr. p. 182*). His lack of familiarity with these lands, and roads in particular, is disclosed by his testimony on cross-examination between pages 192 and 197 of the transcript.

In addition to the surface area wrongfully used as an access, those portions of roads 1 and 16 referred to above, defendants took 50 cu. yds. of native rock which was used on adjacent Section 22. It was taken from that surface area which they had rightfully taken and used under their right of entry, and for which surface area the defendants owed the market value at the time mining operations commenced. (*Q. 2, Ans. 2, Pl. Ex. 1 and 3, Def. Ex. 27, and Pl. Ex. 3, Ex. A*). Lillis over objection that he had not adequately qualified, judged the market value of the rock in place at 50¢ per cubic yard (*Tr. pp. 220-221*).

Defendants constructed a dam or reservoir on the land which as indicated above enhanced the value of the land for grazing. Between September 14 and November 12, 1952, defendants used that dam to pump 15,000 barrels of water to adjacent Section 22 (*Q. 2, Ans. 2, Pl. Ex. 1 and 3*). Defendants deny that plaintiff owned that water, but even if he did, there is no evidence of the market value of the water at the dam. Lillis and others testified over objection to the cost of transporting water from various sources outside the section, with their delivery at a drill site. Lillis said 15¢ to 20¢ a barrel (*Tr. pp. 185-186*); Russell said 30¢ per barrel (*Tr. pp. 204-206*; Morton testified 25¢ per barrel (*Tr. pp. 199-201*).

Plaintiff's Exhibit 10 was offered, objected to, and the court reserved a ruling on the exhibit (*Tr. pp. 197-198*). Morton using that as a foundation for his testimony, was asked his opinion concerning the reasonable and fair market value of the 24½ acres of land on this particular lease "for the purpose of drilling

for oil, bearing in mind that it is only the surface which the plaintiff owns" (*Tr. p. 202*). Over objection, the witness then testified that conservatively speaking it was his honest opinion the value of the surface rights only insofar as the 24½ acres were concerned would be somewhere between \$10,000 and \$20,000 (*Tr. pp. 202-203*). The sole foundation for the man's testimony was that he had been in the oil business leasing and drilling for 30 years, and was familiar with the cost of producing leases, and the cost of lands for drilling for oil. He had never been on the land, knew nothing about the lease, other than plaintiff's Exhibit 10. Objections to his testimony are set out in the transcript at pages 199-200, and 202.

Russell claims a contract with the defendants Texas Company and Manning Drilling Company by reason of letter (*Pl. Exh. 4, 5, 6, and 7; Def. Exh. 32 and 33*). Los Angeles attorneys purportedly acting on behalf of Russell wrote a letter dated October 28, 1952, and copy of which was addressed to and was received by The Texas Company, in which they described the use of roadways on Section 23 for operations on adjacent lands, and use of water and materials, as a wilful trespass and conversion and that "compensation for such trespass at the rate of \$150 per day is hereby demanded by return remittance." The letter then stated:

"Mr. Russell is willing to permit you a revocable license to continue the use of the extent that the same has existed over the past period upon your payment to him of the sum of \$150 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the roadway, water and/or material will constitute your acceptance of this revocable permit. Your remittance should be made to Mr. Theodore B. Russell \* \* \*". (*Tr. pp. 78-80*)

Defendants used the access roads until they constructed a

road around the section, and then ceased such use on November 22, 1952.

In other words, after October 28, 1952, defendants used no rock; pumped water, title to which is in dispute, from a surface area for which they owed the market value, until November 12, 1952; and used the 1.863 acres of roads until November 22. All other use of the land was a proper and authorized use.

Russell attempted to prove that the reasonable value of the use of those roads was \$2.00 per day (*Tr. p. 182*) for which he claims a total of \$110.00 for 55 days' use prior to October 28, 1952 (*Appellant's brief page 41*). Yet he claims on the strength of the foregoing \$3600 for 24 days' use after October 28, or at the rate of \$150 per day.

Under date December 16, 1952, postmarked December 26, 1952, defendant The Texas Company responded with a letter advising that it had used such an access road for a very short distance, had used some materials in building part of a road on Section 22, had used some water for the adjacent sections, that it should reimburse Mr. Russell for any actual damage he may have suffered from such unauthorized use, and stated:

"What that damage amounted to, it is difficult to say, but certainly it is not great. The land is open, rolling, grazing land, and probably not worth over \$5.00 an acre for grazing purposes. The suggested compensation of \$150.00 a day for the time that this road may have been used in operations upon adjoining lands is so far beyond the actual detriment to Mr. Russell, that it will not be considered." (*Tr. pp. 81-83; Def. Exh. 32; Tr. p. 90, Def. Exh. 33*).

## STATEMENT OF THE CASE

### a. First Issue:

As appears from the pleadings in this case, the Railway Company received a patent to this section from the United States,

and in its conveyances to the predecessor in interest\* of the appellant Russell, the Railway Company as vendor reserved unto itself and to its successors and assigns forever:

“all minerals of any nature whatsoever, including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the grantor, its successors and assigns, shall pay to the grantee, or to his heirs or assigns, the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon.”

Thereafter the Railway Company entered into a written oil and gas lease with the appellee and cross-appellant, The Texas Company. Acting under the authority of that oil and gas lease in writing, The Texas Company entered upon Section 23, drilled oil wells thereon, and in connection with such operation built roads on the premises surfaced with scoria or rock taken from the premises, used those roads, constructed a reservoir and appropriated water therein, used the water from the reservoir and its drilling operations, and extracted and carried away oil from the premises.

If the Railway Company was the owner of the minerals in the land, and the owner of the right to use the surface for mining purposes, as found by the trial court, The Texas Company was not a trespasser upon Section 23 when it entered and mined the Section for the purposes of producing oil. The Texas Company was required, however, under the reservation above quoted, as lessee of the Railway Company, to pay to the appellant Russell as the owner of all surface rights other than the use of the surface for mining purposes, the market value at the time mining operations were commenced of such portion



of the surface as was used in such mining operations, including any improvements thereon.

The trial court found that The Texas Company commenced mining operations March 14, 1952; used a total of 23.76 acres in its mining operations; that the surface of the section was rough, dry, unirrigated, uncultivated land suitable only for grazing purposes, and except for the mining operations by The Texas Company had been used solely since 1920 for grazing purposes; that the most valuable use available to the appellant Russell for Section 23 as of the date mining operations commenced on March 14, 1952, was the use for grazing purposes; that the market value of the use to the appellant Russell on March 14, 1952, was \$10 per acre, and the rental value was \$100 per year (*Tr. p. 114, Findings of Fact VIII, IX, X, and XI*). The court awarded to appellant Russell the sum of \$237.60 for the reasonable market value as of the date mining operations commenced of that portion of the surface taken for mining purposes.

Accordingly, the first issue on this appeal arises out of the award of the trial court to appellant Russell of a total of \$237.60 representing the reasonable market value of the surface rights owned by Russell in the 23.76 acres taken by The Texas Company in its mining operations.

Appellant Russell claims that he is entitled to the reasonable value of the use of that 23.76 acres to The Texas Company for mining purposes, or a sum which he claims to be between \$10,000 and \$20,000. The Texas Company asserts that Russell never owned the surface for mining purposes, that he owned the right to use the surface for all purposes other than mining, that the highest value of the surface rights owned by Russell, is under the evidence the value for grazing purposes; and that

value under the conflicting evidence is the \$10 per acre awarded by the court.

## **b. Second Issue:**

The second issue arises out of the scoria or rock used by The Texas Company in construction of roads used both for mining operations on Section 23, and on adjacent sections; the use of water from the reservoir in drilling operations on Section 23 and also in drilling operations on adjacent sections; and the use of roads for mining operations on Section 23, and as an access to adjacent lands. The court found that all of the rock used by The Texas Company in the construction of roads was taken from the 23.76 acres for which it owed the market value to appellant Russell, and for which the court awarded judgment for the market value to appellant Russell, and the trial court refused to make any additional award to the appellant Russell for such rock. (*Tr. p. 117, Finding XVI*).

The court also found there was no competent evidence concerning the reasonable market value of the water used, and refused to make an award for such water, and found there was no competent evidence concerning the reasonable value of the use of roads, and refused to make an award for such purposes.

Accordingly, appellant Russell contends in the second place that he was entitled to an additional award for the rock used, the water used, and the use of the roads.

The Texas Company contends, on the other hand, that the trial court was correct in its findings of fact and holding in that respect, and contends further that since it was not a trespasser upon the land, it had a right to appropriate the water to its own use, and was in fact the owner of all water so used.

**c. Third Issue :**

The third basic issue arises out of an alleged contract which the court found between The Texas Company and appellant Russell arising out of an alleged revocable license in the use of Section 23 as an access to adjacent lands. (*Tr. pp. 115-116, Findings XII, XIII, XIV; Tr. p. 119; Conclusion of Law V.*)

The Texas Company used no rock on adjacent lands subsequent to October 28, 1952, the date of the alleged contract offer; used water on adjacent lands, title to which is claimed by The Texas Company as an appropriator, until November 12, 1952; and used the small fraction of 1.86 acres of road as an access to adjacent land until on November 22, 1952, when it completed construction of access roads around the section, whereupon it immediately ceased use of all roads on Section 23 as an access to adjacent lands.

Appellant Russell claims damages at \$2.00 per day for the 55 days prior to the date of October 28, 1952, or a total of \$110.00, for the use of all roads on the section. As indicated, the court felt there was no sufficient competent evidence for such valuation, and refused to award that sum. For the 24 days' use after October 28, 1952, the court did award a total of \$3600.00, or at the rate of \$150.00 per day, under an alleged contract which the court found between appellant and The Texas Company. The Texas Company has cross-appealed from that portion of the judgment in which the court finds a contract.

In the first place, the evidence is undisputed that appellant Russell has at all times leased the surface of this land to Bert Ekland for grazing purposes, that Ekland was using the land for such purposes, and it is difficult to see how the appellant Russell could impose a contract on The Texas Company under those circumstances.

In the second place, appellant Russell contends that when he specified that silence and the continued act of user would be deemed by him an acceptance of the terms of the contract, such made a contract. The Texas Company respectfully submits that before performance of the act called for can be deemed a contract, there must be an additional element of proof—that is, that the performance shall be with the intent thereby to consent to, or accept, the terms of the contract. In this case there was no evidence whatsoever that continued use by The Texas Company until it had built a road around the section indicated any intent upon the part of The Texas Company to consent to, or accept the unconscionable terms of the demand, that is, to pay \$150.00 per day for the use which the appellant himself claims the reasonable value to be \$2.00 per day. There were no prior business dealings between the parties to establish a course of conduct. All there is in the evidence is a notice from appellant to stop the use on penalty of being assessed \$150.00 per day, the act of building another road around the section, and then ceasing of the wrongful use when that other road was completed. We respectfully submit that such facts do not make a contract. Courts will not enforce such an unconscionable bargain, particularly where it is attempted in a unilateral contract.

### **SPECIFICATIONS OF ERROR**

1. The court erred in arriving at its Finding of Fact No. XIV, as follows:

“XIV. That from and after the 30th day of October, 1952, and up to and including November 22, 1952 the said defendant continued using the roadways, water and rock from plaintiff's said lands in connection with its operations on adjacent lands and thereby accepted plaintiff's offer of a revocable license at the rate of \$150.00 per day; that said defendant used the roadways, water and rock upon

plaintiff's sadi lands in connection with its operations on adjacent lands under said revocable license for a period of 24 days." (*Tr. p. 116.*)

2. The Court erred in arriving at its Conclusion of Law No. V as follows:

"That the defendant The Texas Company has wrongfully used Section 23 as an access to adjacent lands and has wrongfully taken native rock and water from Section 23 for use on adjacent land; that the plaintiff offered said defendant The Texas Company irrevocable license to continue such wrongful use of Section 23 in connection with operations on adjacent lands at the rate of \$150.00 a day, and that by continuing said wrongful use of said Section 23, after receipt of said offer, the defendant accepted said offer and a contract was created thereby between the defendant and the plaintiff under the terms of which the defendant The Texas Company owes the plaintiff the sum of \$3600.00." (*Tr. 119.*)

3. The Court erred in arriving at its Conclusion of Law No. VII as follows:

"That plaintiff is entitled to judgment in the total sum of \$3837.60, together with his costs. (*Tr. 120.*)

4. The Court erred as a matter of law in its final judgment and decree herein in which it ordered, adjudged and decreed that the defendant The Texas Company shall pay to the plaintiff "the additional sum of \$3,600.00 under a contract between the plaintiff and the defendant, The Texas Company, for the use of the lands." (*Tr. 128.*)

## ARGUMENT

### I. First Issue:

- a. Compensation due Mr. Russell for the use by The Texas Company of 23.67 acres in Section 23, 17N-53E, in Dawson County, Montana, in connection with its operations for the development of oil and gas upon that section.

To begin with, it is admitted that Russell was the owner of Section 23 in the spring of 1952, under the deed to his predecessor-in-interest from the Northern Pacific Railway Company (*Tr. pp. 59-60*), where the Northern Pacific Railway Company reserved:

“excepting and reserving unto the vendor its successors and assigns forever all minerals of any nature whatsoever including coal, iron, natural gas and oil, upon or in said land, together with the use of such of the surface as may be necessary for exploring for and mining or otherwise extracting and carrying away the same; but the vendor shall pay to the purchaser the market value at the time mining operations are commenced of such portion of the surface as may be used for such operations, including any improvements thereon;”

It is further admitted that The Texas Company entered upon this land March 14, 1952, under an oil and gas lease from the Northern Pacific Railway Company, and drilled one well for the production of oil or gas, and thereby became obligated to pay Mr. Russell the market value at the time such operations were commenced of such portion of the surface of that section as was used for such operations.

The evidence established, and the court found, that the amount of land used by The Texas Company in connection with its operations on section 23 was 23.76 acres, and that the market value of such land was \$10.00 per acre. (*Finding of Fact No. 11, Tr. p. 114*).

It is admitted that The Texas Company used 190 yards of scoria or rock from section 23 for use in building roads on that section in connection with its operations thereon (*Tr. p. 75*).

The court found that all of the scora or rock used by The Texas Company from section 23 in connection with its operations thereon (as well as upon adjacent land) was taken from

the 23.76 acres of plaintiff's land, referred to in the court's Finding No. 11, "for which the plaintiff became compensated by the payment to him of the market value of said 23.76 acres at the time defendant commenced its operations on his said lands." (*Tr. p. 117*).

It is further admitted that on or about April 17, 1952, The Texas Company constructed a dam in a coulee located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$  Sec. 23, creating a reservoir into which surface water drained coming down hill from section 26 in the same township and range, and that The Texas Company used 34,000 barrels of water from that reservoir in connection with its operations on section 23 (*Tr. p. 74*).

*(1) Value of the Land*

Mr. Ekland testified that he owned sections 24 and 26 adjoining section 23, and four sections cornering with section 23; that he had leased section 23 from Mr. Russell since 1920; that said section 23 is rolling and cut up with two or three gullies going through it. The land is used solely for grazing. There is no water on the land, except that collected and impounded by The Texas Company in the reservoir built by it on the section, except when it rains and the holes on the land hold water (*Tr. p. 224*). He valued the lands for grazing purposes at \$7.00 or \$8.00 per acre (*Tr. p. 27*). Ekland paid Russell \$100.00 per year rental for section 23 (*Tr. p. 65*).

Counsel, at page 48 of their brief, insist that the 23.76 acres of section 23 used by The Texas Company in its operations thereon was worth from \$10,000 to \$20,000, basing their contention upon the testimony of Keith C. Morton, who testified that he was engaged in the business of oil well drilling and operating (*Tr. pp. 202-203*).

This raises the question as to the basis of Russell's claim for

damages or compensation. Counsel insist that Russell's claim should be based upon the value of the use of the land to The Texas Company. We contend, on the contrary, that the only available use of the land which appellant Russell had for sale, was the use for grazing purposes.

We must keep in mind the nature of the title acquired by appellant Russell and what he had available for use and for sale as of March 14, 1952. In addition to the fee title to the minerals themselves, defendant Railway Company had expressly excepted and reserved:

"The use of such surface as may be necessary for exploring for, and mining or otherwise extracting and carrying away the minerals."

In Montana, a grant is to be interpreted in favor of the grantee, except that a reservation in any grant is to be interpreted in favor of the grantor (*67-1518 R.C.M. 1947, originally enacted in 1895*). Furthermore, the right or title reserved or excepted at all times remains in the grantor, and never passes to the grantee (*City of Missoula v. Mix, 123 Mont. 372, 214 P. (2d) 212*).

Accordingly, the Railway Company and its assigns at all times excepted, reserved, and owned, the right to use the surface of Section 23 for mining purposes. That right, that use, that title never passed to the appellant Russell. He could not prevent the defendants from so using the land; he could not use it himself for such mining purposes; he could not sell such right or use to anyone else. Appellant Russell owned only the right to use the surface for purposes other than mining, and that right was subordinate to the right of entry by the mineral owner. The evidence is undisputed that he owned dry, rough, unirrigated, unwatered, open range which had been used only for grazing since at least 1920, and which was suitable only for grazing.



The value of the highest use owned by appellant Russell was the value for grazing purposes, which is the value that was awarded to him by the court.

We shall not refer to the cases cited in support of this position by counsel for Mr. Russell, as we do not think any of those cases are in point upon the question here presented.

As the court says in its memorandum (*Tr. pp. 123-124*):

“The plaintiff takes the position that the market value to be paid is to be based upon the highest value of the land for any purpose, and argues that the highest use for which said section 23 was suitable was for an oil well site, and that he should be compensated accordingly. To dispose of this argument, it is only necessary to point out that plaintiff, under the terms of the mineral reservation in his title, never had the right either himself to use the surface as an oil well site, or to sell the surface for such use to others. He is entitled to be compensated only for the value of the highest and best use to which he himself could put the land. The evidence in this respect shows the highest and best use to which plaintiff could put the land was for grazing.”

As was held by the Supreme Court of this state in the case of *State v. Hoblitt, et al*, 87 Mont. 403, 288 Pac. 181:

“The owner has the right to obtain the market value of the land, based upon its availability for the most valuable purpose for which it can be used, whether so used or not, but to be available for a purpose means capable of being used for that purpose, and, as the market value at the date of the summons control, the land must be shown to have been marketable at that time for the purpose stated \* \* \*, the showing must be that the use is one to which the land may reasonably be applied.”

In the case of *U. S. v. Boston, etc. Canal Co.*, 271 Fed. 877, the Circuit Court of Appeals, First Circuit, states:

“We are of the opinion that, in ascertaining the market value of property taken in a condemnation proceeding the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only

party who can use the property for that purpose . . .

"The canal property, as a toll-producing instrumentality is or may be of value to any person or owner. But the government upon whom the duty of national defense devolves is the only party to whom it has special utility for military and naval purposes. The evidence in question under this assignment had no relation to the toll-producing qualities of the canal, and had nothing to do in the way of showing its utility or availability for military or naval purposes in the hands of any person other than the government. Its sole bearing was upon the special and peculiar utility of the property to the government as a taker for purposes of national defense. The evidence was incompetent."

In the case of *Continental Land Co. v. U. S.*, 9th Circuit, 88 (Fed. (2d) 104, this court used the following language:

"The following from the Supreme Court in *United States v. Chandler-Dunbar Water Power Co.*, supra, 229 U. S. 53, at page 76, 33 S. Ct. 667, 677, 57 L. Ed. 1063, is decisive: 'The government had dominion over the water power of the rapids and falls, and cannot be required to pay any hypothetical additional value to the riparian owner who had no right to appropriate the current to his own commercial use. These additional values represent, therefore, no actual loss, and there would be no justice in paying for a loss suffered by no one in fact. The question is what has the owner lost, and not what has the taker gained.'

"It is axiomatic that if the riparian owner has no right to approach the river as against the right of navigation, he has no inherent right of value 'adaptable to special use' over and above the reasonable market value of the upland for any purpose to which it may reasonably be adapted now, or in a reasonable time in the future. This was fairly submitted to the jury. This issue is no newly created relation or right, but has existed long prior to the private ownership in the land. The rights were fixed and relations established by the adoption of the Constitution.

"The claim of appellants has no substance, it has no possessory status; it is based upon something which is not possessed, and not being possessed, it has to appellants no

value, and appellants lost nothing. The question is, what have appellants lost, not what appellee gained.”

In the case of *Washington Water Power Co. v. U. S.*, 9th C. C., 135 F. 2d 541, cert. den., 64 S. Ct. 50, 320 U. S. 747, the court used the following language:

“In the ordinary case, the evidence offered by the company would be pertinent as to the question of ‘reasonable probability’ for the special use, and as to the value of the property for such use. However, this court has held that since a riparian owner has no property right in the bed of the stream or to the use of the water or the power inherent therein as against the United States, such riparian owner may not recover for the alleged power-site value of the riparian lands.”

Other cases to the same effect are:

*U. S. v. Miller*, 63 S. Ct. 276, 317 U. S. 369;

*U. S. v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 S. Ct. 667;

*Boston Chamber of Commerce v. City of Boston*, (Mass.) 217 U. S. 189, 30 S. Ct. 459.

It is our belief and contention that inasmuch as Mr. Russell could not use the surface of section 23 for the purpose of exploration for minerals thereon, and could not sell that right to any other person, the value of the surface of the section for such operations could not be the basis for compensating Mr. Russell for the use thereof for that purpose. The only available use to which Mr. Russell could put the surface of Section 23 was for grazing, and that is the basis upon which his compensation was based by the court, and must be based.

In any event, there is no competent evidence justifying the evaluation claimed by appellant. The sole and only evidence was the testimony of K. C. Morton which was allowed by the trial court subject to running objection (*Tr.* 199-200, 202). In the first place, Morton attempted to place a value on the use to

to The Texas Company for mining purposes after mining developments had been fully completed, instead of the market value of that use owned by appellant Russell as of the date mining operations commenced on March 14, 1952. In the second place, all rules of evidence relative to the admissibility of the testimony of expert witnesses was violated. Morton had never seen the property upon which he placed his valuation, and thus had no personal knowledge of it, and his opinion was required to be elicited by a proper hypothetical question, or a showing of the facts upon which his expert opinion was based, none of which was attempted. The facts shown were required to relate to the time or date when the evaluation was being judged, or in this case to March 14, 1952, which was not attempted. His opinion was solicited upon generalized inquiry concerning other testimony heard by the witness, without any attempt to delineate what that testimony was, and was further attempted to be supported upon incompetent and irrelevant evidence (*Pl. Ex. 10*). He was never asked to assume the truth of the facts upon which his opinion was requested, nor to delineate the facts upon which his opinion was based. The objection to his testimony in addition to other grounds included that there was no proper foundation; his testimony was not within the issues of the pleadings; it was incompetent, irrelevant and immaterial; and it had no bearing on the issue of the market value of this grazing land at the time operations were commenced (*Tr. 199-200; 202*).

*Volume 2, Wigmore on Evidence, Third Edition, Subdivision 4, Hypothetical Questions, Pp. 792, Sec. 672; Sections 674-677, Pp. 796-798; Section 681, Pp. 800-805;*

*Volume 2, Jones on Evidence, Fourth Edition, Pp. 701, Sec. 374; Pp. 703, Sec. 375;*

*Volume 2, Bancroft's Court Practice and Remedies, Pp. 1784, Sec. 1310.*

Montana has accepted or recognized the same basic rules, *Irion v. Hyde*, 110 Mont. 576 at 578, 105 P. (2d) 666; and see *U. S. v. Sampson*, 9th C. C., 79 F. (2d) 131; *U. S. v. Noble*, 9th C. C., 79 F. (2d) 342.

Accordingly, the court awarded to Mr. Russell under the conflicting evidence the market value of the only right which appellant Russell owned and had for sale, the use for purposes other than mining. In any event, there was no competent evidence on the evaluation now claimed by appellant.

## **II. Second Issue:**

### *a. Right to the Use of the Water in Drilling Operations on Section 23.*

The appellant Russell claims that he is entitled to the sum of \$5100.00 for the use of 34,000 barrels of water used in the operations of The Texas Company on Section 23, which was taken from a reservoir installed on that section by The Texas Company.

In the first place, there is no competent evidence in the record as to the value of that water on section 23. All of the witnesses who testified on this point for Mr. Russell based their estimate as to the value of the water upon the cost of transporting the same for a distance of from two to four miles (*Tr. pp. 186, 200, 20, 205*). The court, in its Finding No. 16, concluded:

“There is not sufficient evidence in the record from which it could determine the reasonable market value of said water.” (*Tr. p. 117*).

Further, as anticipated by counsel for Russell, at pages 48 and 49 of their brief herein, we do contend that The Texas

Company and not Mr. Russell was the owner of the water in question.

The facts show that the land in question is rough, and cut up with draws or gullies running through the same. As Mr. Ekland testifies, the section is rolling and cut up with two or three gullies going through it, and part of the north part of it is kind of bad land. The rest of it is fairly good grazing land. Prior to the building of the dam by The Texas Company, the only water on the land is "when it rains and then holes fill up with water." There is a little seepage under a coal vein, but it is not very much." (*Tr. p. 224*).

About April 17, 1952, The Texas Company constructed a dam creating a reservoir on section 23, into which the surface waters coming down from section 26 drained. The Texas Company used about 34,000 barrels of that water in its drilling operations on section 23 between April 17, 1952, and August 29, 1952 (*Tr. p. 74*).

Section 89-801 R.C.M. 1947, provides:

"The right to the use of the unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."

See also: *Doney v. Beatty*, 1241 Mont. 41, 220 P. (2d) 77.

The Supreme Court of the State of Montana has held that any person who, in the absence of any conflicting and adverse claim, has actually diverted water and put it to a beneficial use, acquires title thereto.

*Murray v. Tingley*, 20 Mont. 260, 50 Pac. 722;

*Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575.

As a complete answer to any such contention by The Texas Company, counsel at page 49 of their brief herein quote from

the case of *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081, which holds that one person could not go upon the land of another for the purpose of making an appropriation of water, except by condemnation proceedings.

However, the rule laid down in that case was subsequently modified by the Supreme Court of this state in the case of *Connolly v. Harrel*, 102 Mont. 295, 57 P. (2d) 781, where the court says:

"In the case of *Scott v. Jardine Gold Mining & Milling Co.*, 79 Mont. 485, 257 P. 406, 410, it was said: 'It is settled law that one may not acquire a water right on the land of another without acquiring an easement in the land.' The following cases are cited as supporting the statement: *Prentice v. McKay*, 38 Mont. 114, 98 P. 1081; *Smith v. Denniff*, 24 Mont. 20, 60 P. 398, 50 L.R.A. 737, 741, 81 Am. St. Rep. 408, and *Warren v. Senecal*, 71 Mont. 210, 228 P. 71."

\* \* \* \* \*

"We conclude that the attempted appropriations of the defendants made under a license from Jensen to use his ditch and point of diversion were valid appropriations. The general expressions found in the previous decisions of this court mentioned, *supra*, are hereby limited to cases of trespass."

Therefore, under the present rule of our court, anyone may make an appropriation in a reservoir of diffused surface water upon the lands of another unless he is a trespasser.

Here, it is apparent that The Texas Company was not a trespasser on section 23, but entered the section and had possession of the surface thereof by virtue of the reservation of the Northern Pacific Railway Company in the deed by it to Mr. Russell's predecessor-in-interest, and likewise under the oil and gas lease from the Northern Pacific Railway Company to it. Therefore it is our contention that The Texas Company law-

fully appropriated and owned the water impounded by it in the reservoir constructed by it in section 23.

b. *Scoria or Rock.*

As to the scoria and rock taken from section 23 and used in the building of roads constructed thereon, which roads were used by The Texas Company in its operations on the same section, the evidence established that The Texas Company used 190 cubic yards of such materials in the construction of roads on section 23 in connection with its operations thereon.

The witness Lillis, without being qualified, testified that in his judgment the value of the materials (rock or scoria) in that particular instance was largely due to its availability, accessibility and closeness to its use, and 50¢ a cubic yard would probably cover that as the value of the material in the quarry from which it was taken (*Tr. p. 184*).

Here again the witness bases his judgment as to the market value of such materials on what he considers the value thereof to The Texas Company, —not on the reasonable market value of the material in place on the premises.

In its Findings of Fact and Conclusions of Law herein, the lower court does not determine the value of the scoria or rock taken from said section 23 by The Texas Company, holding that this rock was taken from the 23.67 acres, for the taking of which plaintiff (Russell) is being compensated, and no additional damage by reason of the use of the rock is shown (*Tr. p. 124*).

It is our opinion that the reasonable market value of such scoria or rock is established by the witness Tommie Bliss when he testified as follows:

“Q. Did your company have occasion to buy any of the local scoria, or country rock, for use in any roads?  
A. Yes.



“Q. About when was that, if you remember?

“A. When this by-pass road was built around 23, section 23, we dealt with Mr. A. R. Newton for scoria to be taken off of his section 22, and we dealt with him at five cents per yard.

“Q. Is that what you paid Mr. Newotn for the rock in place? A. That's right.”

(Tr. pp. 220-221.)

Therefore we contend that the allowance of \$237.60 to Mr. Russell by the court in its Findings and Judgment, as the amount Mr. Russell is entitled to for the use of the surface, scoria and rock by The Texas Company in connection with its operations upon section 23, is proper, and the only amount that Mr. Russell could be entitled to under any theory of the case.

### III. Third Issue:

*Cross Appeal by The Texas Company from the Decree in this case awarding Russell, the Cross-Appellee, the sum of \$3600.00.*

The decree herein awards Russell a judgment against The Texas Company for \$3600.00 “under a contract between plaintiff and the defendant The Texas Company.” (Tr. p. 128).

The facts in this case, as to which there is no dispute, are that in the spring of 1952 The Texas Company, proceeding under the terms of an oil and gas lease covering Section 23, in Twp. 17 N., Rge. 53 E., entered into the possession of that section for the purpose of drilling an oil and gas well thereon and in connection with such operation used 23.67 acres of the surface of the said section 23, which surface belonged to Russell, the cross-appellee herein.

On or about April 17, 1952, The Texas Company constructed a dam creating a reservoir on said land, in which it gathered and impounded surface water coming down the hill from section

26 in the same township and range, and used about 15,000 barrels of that water for drilling operations in section 22 between September 14, 1952, and November 12, 1952. No water was ever taken from section 23 for use on either section 23 or section 22 or any other land (*Tr. p. 74*).

It is further admitted that cross-appellee, The Texas Company, used the roads constructed by it on section 23 for access to sections 22 and 26 until November 22, 1952 (*Tr. p. 94*).

The judgment for \$3600.00 against The Texas Company is based upon the alleged contract between Russell and The Texas Company is based upon the alleged contract between Russell and The Texas Company, arising by reason of the letter from Vaughan, Brandlin & Wehrle to The Texas Company dated October 28, 1952. Therein it was stated:

“This conduct by you over the period of the past sixty days constitutes a wilful trespass and conversion for which there is no authority in law or fact. Compensation for such trespass at the rate of \$150.00 per day is hereby demanded by return remittance.

“Demand is made that you forthwith cease and terminate your said use of the roadways, water and materials.

“Mr. Theodore B. Russell is willing to permit you a revocable license to continue the use to the extent that the same has existed over the past period upon your payment to him of the sum of \$150.00 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the roadway, water and/or materials will constitute your acceptance of this revocable permit. Your remittance should be made to Mr. Theodore B. Russell, 2422 Forest Drive, Des Moines 12, Iowa.” (*Tr. p. 86*).

This letter was not answered by The Texas Company until that company wrote to Mr. Russell's attorneys under date of December 16, 1952, wherein Mr. Will, who signed the letter

on behalf of The Texas Company, refused to consider the offer made by Mr. Russell (*Tr. p. 82*).

As pointed out above, it is the contention of counsel for Mr. Russell that the continued use of the surface of section 23 by The Texas Company in connection with its operations on the adjacent sections 22 and 26 constituted an acceptance of the offer made on behalf of Mr. Russell by his attorneys, and resulted in a contract between the parties whereby The Texas Company agreed to pay Mr. Russell at the rate of \$150.00 per day for each day thereafter that The Texas Company so used the surface of section 23 in connection with its operations on adjacent sections.

The letter from Mr. Russell's attorneys above referred to was dated October 28, 1952, and assuming that it was mailed on that day, should have been received by The Texas Company not earlier than October 30, 1952. The court found: "That from and after the 30th day of October, 1952, and up to and including November 22, 1952, the said defendant continued using the roadways, water and rock from plaintiff's said lands in connection with its operations on adjacent lands, and thereby accepted plaintiff's offer of a revocable license at the rate of \$150.00 per day; that said defendant used the roadways, water and rock upon plaintiff's said lands in connection with its operations on adjacent lands under said revocable license for a period of 24 days." (*Finding of Fact No. XIV, Tr. p. 116.*)

That Finding is incorrect in some particulars. The only evidence in the record as to the extent of the use of section 23 by The Texas Company of water and scoria from said section 23 is found in the admission of The Texas Company in answer to Russell's interrogatory at page 74 of the Transcript where it is stated that no water was taken from the dam in Section

23 for the use on adjoining lands in Sections 22 or 26 after November 12, 1952, and no scoria or rock was taken from Section 23 for use on other lands after October 31, 1952.

Likewise the admission of The Texas Company, in reply to interrogatory of Russell conceded that The Texas Company ceased its use of the roadways over and across section 23 as a means of access to lands in sections 22 and 26 on November 22, 1952. (*Tr. p. 94*).

Mr. Russell's offer to The Texas Company, contained in the letter from his attorneys above referred to, was that he was willing "to permit you (The Texas Company) a revocable license to continue the use to the extent that the same has existed over the past period upon your payment to him of the sum of \$150.00 per day for each day that such use continues, the said sum to be payable daily. Your continued use of the roadways, water and/or materials will constitute your acceptance of this revocable permit."

It is our contention that the use of the roadways over Section 23 and the water produced and impounded on Section 23 in the operations of The Texas Company on adjacent sections after October 30, 1952, constituted no consideration whatever for the alleged promise by The Texas Company to pay Russell \$150.00 per day.

In the first place, Russell was granted judgment against the Company for the *full market value* of 23.67 acres of Section 23 used by The Texas Company in its operations on Section 23 and that acreage belonged to The Texas Company so long as it was operating thereon and the roads being constructed. The use thereof by The Texas Company constituted no additional burden on Russell.

Insofar as the surface waters impounded on Section 23 were

concerned, as we pointed out above, that water belonged to The Texas Company and could be used by that Company at any place or location that it saw fit without creating an obligation of any kind to Mr. Russell therefor.

As pointed out above, no scoria or rock taken from Section 23 was used by The Texas Company on adjacent lands after the receipt of the letter of October 28, 1952. Therefore, there was no consideration of any kind for the alleged promise by The Texas Company to pay Mr. Russell \$150.00 per day for such use.

Further, it appears from the testimony of Mr. Ekland that at all of the times mentioned he occupied Section 23 under a lease from Mr. Russell covering all of Section 23 (*Tr. p. 223*). Therefore, if anyone was entitled to collect any rental or compensation for use of the 23.67 acres of the surface of said section, it would be the tenant Ekland, not Mr. Russell.

In any event, whether The Texas Company was entitled to the use of the roads in Section 23 and water from the reservoir on Section 23 in connection with its operations on adjacent lands, Mr. Russell was not entitled to any compensation therefor.

In addition to the fact that appellant Russell had already leased the surface to Bert Ekland for grazing purposes, and could not therefore impose a contract upon The Texas Company, and in addition to the fact that he is attempting to impose an unconscionable contract of \$3,600 for 24 days' use of 1.86 acres of road, for which his own evidence indicates the reasonable value would be a total of \$48, we submit that there is no evidence of any intention upon the part of The Texas Company by continuing to use the 1.86 acres of road to thereby enter the unconscionable contract which appellant Russell now attempts to impose.

Our only user wrongfully after the letter of October 28, 1952,

was mailed, was the 1.86 acres of roads. For 55 days of use of all of the roads before October 28, the appellant claims:

“The only testimony before the court as to the value of the use of the roads for access to defendant The Texas Company’s operations on lands other than the lands of the plaintiff, is the testimony of Mr. Lillis, who testified that the use of these roads should be reckoned at at least \$2.00 per day. (R. 182) This testimony was not disputed or contradicted. The Texas Company, having commenced its use of these roads for operations on lands other than those of the plaintiff on September 3, 1952, plaintiff’s recovery for the use of the roads up to the time of the letter of October 28, should have been \$110.” (*Appellant’s brief*, p. 41).

And yet, for the 24 days thereafter between October 30 and November 22, for which the value of the use according to appellant’s own evidence would be a total of \$48, appellant was awarded and claims a total of \$3600.

Summarizing the facts, the defendants had a legal right to enter and use the surface of Section 23 for operations on Section 23. Appellant Russell had already leased the surface of these lands to Bert Ekland, and had no right to impose a contract for such use upon the defendants. There were no prior business dealings between the parties which would indicate that continued use of the roads until a new road had been built would constitute an acceptance or consent. When notified to stop using the roads, The Texas Company constructed a new roadway around Section 23, and then ceased use of such road. By letter dated December 16, 1952, The Texas Company expressly rejected the unconscionable offer. The plaintiff in his own pleading by asking for an injunction indicates there was no such contract. It is unreasonable to assume that The Texas Company intended to consent to pay a total of \$3600, when

the reasonable value of the use according to appellant's own testimony was a total of \$48.

*Montana Statutes Pertinent.*

*Montana Statutes Pertinent.* Appellant relies solely on the provisions of Section 13-320. That section, however, must be read in conjunction with the other sections. Other sections indicate that before performance of the conditions of a proposal can be considered an acceptance, there is an additional requirement, and that is that there was thereby an intention to accept the proposal and make the contract. Such is suggested by the provisions of *Section 13-317, R.C.M. 1947*, in which our code specifies that consent can be communicated with effect only by some act of the party contracting "by which he intends to communicate it, or which necessarily tends to such communication." Such is the rule recognized by the *Restatement of Law Contracts*, by the opinion of the faculty of the Montana State University Law School, which wrote the "*Montana Annotations to the Restatement of the Law of Contracts*," by Williston, and by general authorities.

Montana statutes particularly pertinent are:

"13-102. Essential elements of contract. It is essential to the existence of a contract that there should be:

- "1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and
4. A sufficient cause or consideration."

"13-301. Essentials of consent. The consent of the parties to a contract must be:

- "1. Free;
2. Mutual; and,
3. Communicated by each to the other."

"13-317. Communication of consent. Consent can be communicated with effect only by some act or omission of the

party contracting, by which he contends to communicate it, or which necessarily tends to such communication.

"13-318. Mode of communicating acceptance of proposal. If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted."

"13-319. When communication deemed complete. Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to the last section."

"13-320. Acceptance by performance of conditions. Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal."

*Section 55 of the Restatement of the Law of Contracts* provides:

"ACCEPTANCE OF OFFER FOR UNILATERAL CONTRACT; NECESSITY OF INTENT TO ACCEPT."

"If an act or forbearance is requested by the offeror as the consideration for a unilateral contract, the act or forbearance must be given *with the intent of accepting the offer.*" (Italics supplied.)

With respect to that section, the *Montana Annotation* states:

"Sec. 55. Acceptance of offer for unilateral contract; necessity of intent to accept.

"No case found. The rule *accords* with the language of cases involving bilateral contract which say that there must be mutual assent to form a contract, or that the parties must give their free and voluntary assent to the terms. (Citing cases.) But in accord with Sections 20 and 23 of the Restatement, *J. Neils Lumber Co. v. Farmers' Lumber Co.*, supra, indicates that, despite the statement made to the contrary, in a bilateral contract it is not necessary that the party intend to accept an offer provided he has manifested an intention to accept. Section 55 in reality therefore lays down an additional requirement of accepting the



offer.' Since an act is equivocal it seems reasonable to require proof of intent."

*Section 72, Volume One, Restatement of Contracts*, provides:

"Sec. 72. ACCEPTANCE BY SILENCE OR EXERCISE OF DOMINION.

"(1) Where an offeree fails to reply to an offer, his silence and inaction operates as an acceptance in the following cases and in no others:

- (a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.
- (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, *and the offeree in remaining silent and inactive intends to accept the offer.*
- (c) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand." (*Sec. 72, Pp. 77*)

The *Montana Annotation* states:

"Clause (b). No authority found but reasonable. See *Williston, Contracts*, Sec. 91A. If the offeree may remain silent with no intention to accept there will be no contract.

"Clause (c). No case found. See *Williston, Contracts*, Sec. 91."

*Williston on Contracts, Revised Edition*, is very helpful. He states:

- a. "Sec. 64. Necessity of acceptance.

"Acceptance of an offer is necessary to create a simple contract, since it takes two to make a bargain. \* \* \*"

(*Vol. 1, Pp. 189*)

- b. "Sec. 67. An intention not to accept may prevent the formation of a contract where words or acts are ambiguous.

“Though if an offeree of a bilateral contract should say, ‘I accept the offer,’ he would not thereafter be allowed to say that his words were not an acceptance because he did not really intend to accept the offer, yet where an act is requested by the offeror and performed by the offeree, *it may be shown that the performance of the act did not indicate assent to the offer.* Even though the offeree knew of the offer, he may if he chooses, do the act requested and still refuse to accept the offer. Thus, in case of an offer of reward for the finding of a watch, the finder may state that though he returns the watch, he does not accept the offer. And even though he makes no such express disclaimer, it is still true that the finding and return of the watch is an ambiguous act which may mean assent to the offer, or which may mean merely that the finder is sufficiently honest to return property which does not belong to him, without desiring a reward. The act may mean either of these things. If in a particular case it indicates assent to the offer, there is a contract; *but it may be evident, when all the facts are known, that the act did not mean assent to the offer. In that event there is no contract.*”

(Sec. 67, Pp. 191, Vol. One.)

- c. “Sec. 91. When silence and inaction may amount to assent.

“Generally speaking an offeree need make no reply to offers, and his silence and inaction cannot be construed as an assent to the offer; but the relations between the parties or other circumstances may have been such as to have justified the offeror in expecting a reply, and, therefore, in assuming that silence indicates assent to his proposal. Such cases may be thus classified:

\* \* \*

“(2) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

“(3) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction was intended by the

offeree as a manifestation of assent, and the offeror does so understand.

\* \* \* \*

(Sec. 91, Pp. 279, Vol. One.)

“Sec. 91B. Silence or inaction with intent to accept.

“Even where the offeror is not justified in understanding the offeree’s silence as an acceptance, a line of argument which has not been formally stated in the cases may be advanced to indicate that mere silence, though unaccompanied by any act, may amount to an acceptance if the offeror requested that mode of indicating assent, *and assent was intended by the offeree*. When an offer is made to one who remains silent, the silence may be due to a variety of causes. It is clear that, whatever may have been the offeree’s state of mind, no contract can be made unless the offer stated that the offeror would assume assent in case the offeree made no reply. *But if the offer does so state, the offeree’s silence is ambiguous, and may doubtless be shown not to have meant assent. Certainly the offeree may with immunity keep silent if he chooses without becoming charged with a contract.* \* \* \*

“Such silence will not establish a contract unless the silent offeree means his silence to indicate assent. \* \* \*

“Sec. 91C. Authorization by the offeree to treat his silence as assent.

“The converse of the situation referred to in the preceding section is also possible. The offeree may authorize the offeror to regard silence as an acceptance of his offer. Such authorization is not likely to be given in express terms, but the conduct of the offeree in previous dealings or in earlier stages of the existing negotiation may have justified the offeror in understanding silence as assent. If he does so understand there is a contract. It is for this reason that the silent retention of a statement of account between the parties may often indicate assent to the correctness of the statement and furnish the basis for an account stated.

“Evidence of usage in a particular trade has been held

admissible with other circumstances to prove assent a justifiable inference from silence.

“A further extension of this doctrine is developing in the cases, —that, where an offeree solicits the offer; this, in the light of the relations of the parties or other surrounding circumstances, may justify the offeror as a reasonable man in interpreting the offeree’s silence after receiving the offer as acceptance.”

(*Sec. 91B, Pp. 284,*  
*Sec. 91C, Pp. 286, Vol. One.*)

The situation we have before us is one in which The Texas Company rightfully constructed and used roads upon the property of appellant Russell. Insofar as a very small portion of these roads (1.86 acres) is concerned, it was used as a connecting road for oil and gas developments in other lands. Russell, who claims the reasonable rental value is \$2.00 per day, thereupon attempted to force this use into the status of an express contract, on his terms, by declaring that rental charges of \$150 per day would be made of The Texas Company for use of the roads, with continued use of the road being interpreted by him as assent, or acceptance of his “offer” by The Texas Company; and with no showing whatever of any intent on the part of The Texas Company to thereby accept his terms.

It is readily acknowledged that Russell may bring an action *ex contractu* for the reasonable value of the use of his property. But he may not convert the use into an express contract calling for a daily rate of payment of his own choosing, which sum might as well have been \$15,000 a day as \$150 a day, if he is right, and which realization must necessarily lay bare the fundamental vice in his contentions. Indeed, if Russell is right, any householder might affix an enormous contractual obligation upon a continued trespass crossing of his yard after a

notice comparable to that made by Russell, and one can think of other outrageous examples almost without end.

The situation created by Russell is deceptive. It looks like a normal offer and acceptance in a unilateral form of contract. The defect is found in the unreasonableness of assuming intent to accept.

The meaning of this rule is clearly demonstrated by two California cases. (Note that the Montana statutes quoted above were taken from California. These two cases may well be the only American decisions dealing with this type of claim. If so, and research makes it appear likely that it is so, it would appear that few litigants have been encouraged to press the legal position here assumed by Russell, for most attorneys have at one time or another seen the groundwork of this type of claim laid.)

In the case of *Wright v. Sonoma County (Cal.)*, 105 Pac. 409, the Supreme Court of California was confronted with a situation where the defendant continued to use water from a certain well even after the California Supreme Court had determined that the water belonged to plaintiff and defendant had no rights therein. This continued use of water was in the face of plaintiff's declaration that \$50.00 per day for the use of such water would be charged in the event defendant disregarded a notice to cease using the water. Plaintiff rested his whole case upon an express contract thereby created to pay \$50.00 per day. The Supreme Court of California said, in answer to plaintiff's contentions:

"The provisions therein to the effect that the owners demand \$50.00 for each and every day on which the notice to refrain from taking water is violated cannot be construed as a proposition to sell water at that rate. It amounted to no more than a notice of the amount of damage that the owners would claim for the taking of the water without their consent. And the taking of the water by defend-

ant under the circumstances shown, even after the decision of the Supreme Court in regard to the relative rights of the parties became known to it, cannot be held to show any acceptance by it of the proposition to sell the water for a specified price. The cases cited by learned counsel for plaintiff in this regard are all cases in which the conduct of the party was such as to afford reasonable evidence of his consent to a proposition theretofore made. So far as any right to compensation for water actually taken is concerned, which is the only right asserted in this action, as was said by the learned trial judge, 'the only claim open to plaintiff, was for the reasonable value of the water.' No such claim has been asserted; the plaintiff, both in his complaint and throughout the proceeding, relying exclusively on his claim that there was an express contract for \$50.00 for each day on which water was used from said well."

In the case of *Sherman v. Associated Tel. Co., Ltd.* (Cal. App.), 224 P. (2d) 847, the Court had before it a situation where defendant had erected wires which extended beyond the boundary of its easement along the boundary of plaintiff's property and overhung plaintiff's property, thereby constituting a trespass. Among other things plaintiff notified defendant to remove the wires overhanging the property within three days and unless the wires were removed plaintiff would charge the defendant \$25.00 pr day for each day the wires remained on plaintiff's property. The court pointed out that the most that plaintiff was entitled to was the reasonable value of the use and occupation of the property and rejected his attempt to compel defendant into an express contract of this nature. The case of *Wright v. Sonoma County* was cited as precedent for the holding.

See also: 17 C.J.S. Contracts, Sec. 41e;

12 Am. Jur. Contracts, Sec. 43.

We respectfully submit the undisputed evidence affirmatively

discloses that appellant Russell had already leased the surface to Bert Ekland, and there is no showing that he had any power or authority to contract to let The Texas Company use it. Appellant Russell claims he is entitled to the reasonable value of the use for the 55 days between September 3 and October 28 at \$2 per day, or \$110.00, but at the rate of \$150.00 per day for the 24 days thereafter until November 22, or \$3600.00. There is no proof whatsoever of any intent on the part of The Texas Company to accept these unconscionable terms by the continued user until the new road could be completed. There is no evidence of any prior dealings between the parties that would justify such inference. There was no contract. Appellant Russell can recover only what he has proved by competent evidence, if any, to be the reasonable value of the wrongful use.

Finally, the following rule is expressed in the work on Contracts, *Corpus Juris Secundum*, Volume 17 at page 475 thereof as follows:

“Where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount both at law and in equity to proof of fraud, oppression, and undue influence. So, while it is ordinarily stated to be the rule at law that the adequacy of consideration is not material, as shown *supra* Sec. 217, a court of law, where the contract is unreasonable and unconscionable, may give a party who sues for the breach, not what the other party promised to pay, but only what plaintiff is honestly and equitably entitled to.”

This rule is supported by the following cases:

- Hume v. U. S.*, 132 U. S. 406, 10 S. Ct. 134;
- Mandel v. Liebman*, N. Y., 100 N. E. (2d) 149;
- Herbert v. Lankershim*, Cal., 71 P. (2d) 221;
- Soza v. First National Bank of Ferndale*, Wash., 138 P. (2d) 181;

*Hanks v. McNeil Coal Corporation, Colo., 168 P. (2d) 256;*

*Stiefler v. McCullough, Ind., 174 N. E. 823;*

*Woods v. Griffin, Ark., 163 S. W. (2d) 322.*

Even if there was any consideration whatever for the agreement alleged to have been created by the letter dated October 28, 1952, from Mr. Russell's attorneys to The Texas Company, followed by the continued use of the roads and water produced on Section 23 in connection with the operation of The Texas Company on adjacent lands for a short period of time, any benefit received by The Texas Company and any detriment suffered by Mr. Russell is so inconsequential and insignificant that no court should allow Mr. Russell judgment for \$3600.00, but only what Russell is honestly and equitably entitled to.

There is no competent evidence of damages for wrongful use. The measure of damages in Montana for a wrongful use of real property is the value of the use to the landowner, the reasonable rental value.

*Section 17-201, R.C.M. 1947;*

*Section 17-402, R.C.M. 1947;*

*Section 17-607, R.C.M. 1947;*

*Pritchard Petroleum Co. v. Farmers Coop., 121 Mont. 1, 190 P. (2d) 55;*

*Bordieu v. Seaboard Oil Corp., Calif., 146 P. (2d) 973, 100 P. (2d) 528;*

*Holbrook v. Continental Oil Co., Wyo., 278 P. (2d) 798.*

## CONCLUSION

March 14, 1952, was the date of the commencement of mining operations by The Texas Company. It used in such operations a total of 23.76 acres. The Texas Company owed Russell



the market value of the surface rights owned by Russell and taken for such mining use as of March 14, 1952. The only surface right owned by Russell was the right to use the surface for purposes other than mining, and that right was subordinate to the right of entry of the owner of the mineral fee. The surface was dry, unirrigated, open range, grazing land. Under conflicting evidence, the court found the market value of March 14, 1952, was \$10 per acre. The Texas Company owed Russell for the 23.76 acres taken \$237.60, the amount awarded by the court. In any event, there was no competent evidence of the value for mining purposes.

Part of the 23.76 acres for which the market value was awarded included roads. There could be no additional award for the rental value of the roads. In any event, there was no competent, substantial evidence of such rental value.

From the 23.76 acres for which the market value was awarded, the appellant took scoria or rock for use in building roads. There could be no additional award for the value of this rock. In any event, there was no competent evidence of the value of the rock.

The Texas Company rightfully entered upon the land for mining purposes and built a dam or reservoir. Not being a trespasser, it had a right to appropriate and use the diffused surface waters trapped in the reservoir. It owned such water, and appellant was not entitled to any award for the water so taken. In any event, there was no competent evidence of the value of such water.

Finally, appellant Russell had already leased the surface to Albert Ekland. He could not impose upon The Texas Company the unconscionable contract proposed. The conduct of The Texas Company clearly reflects that it never intended to accept the

unconscionable terms proposed by appellant Russell. There was no contract.

The only sum to which appellant Russell is entitled is the sum of \$237.60.

Respectfully submitted,

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No. 14983

# United States Court of Appeals

*for the Ninth Circuit*

---

THEODORE B. RUSSELL,

*Appellant,*

vs.

THE TEXAS COMPANY, a corporation,  
FREDERICK T. MANNING DRILLING  
COMPANY, a corporation, and  
THE NORTHERN PACIFIC RAILWAY  
COMPANY, a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

vs.

THEODORE B. RUSSELL,

*Appellee.*

---

## Reply Brief of Appellant

THEODORE B. RUSSELL

---

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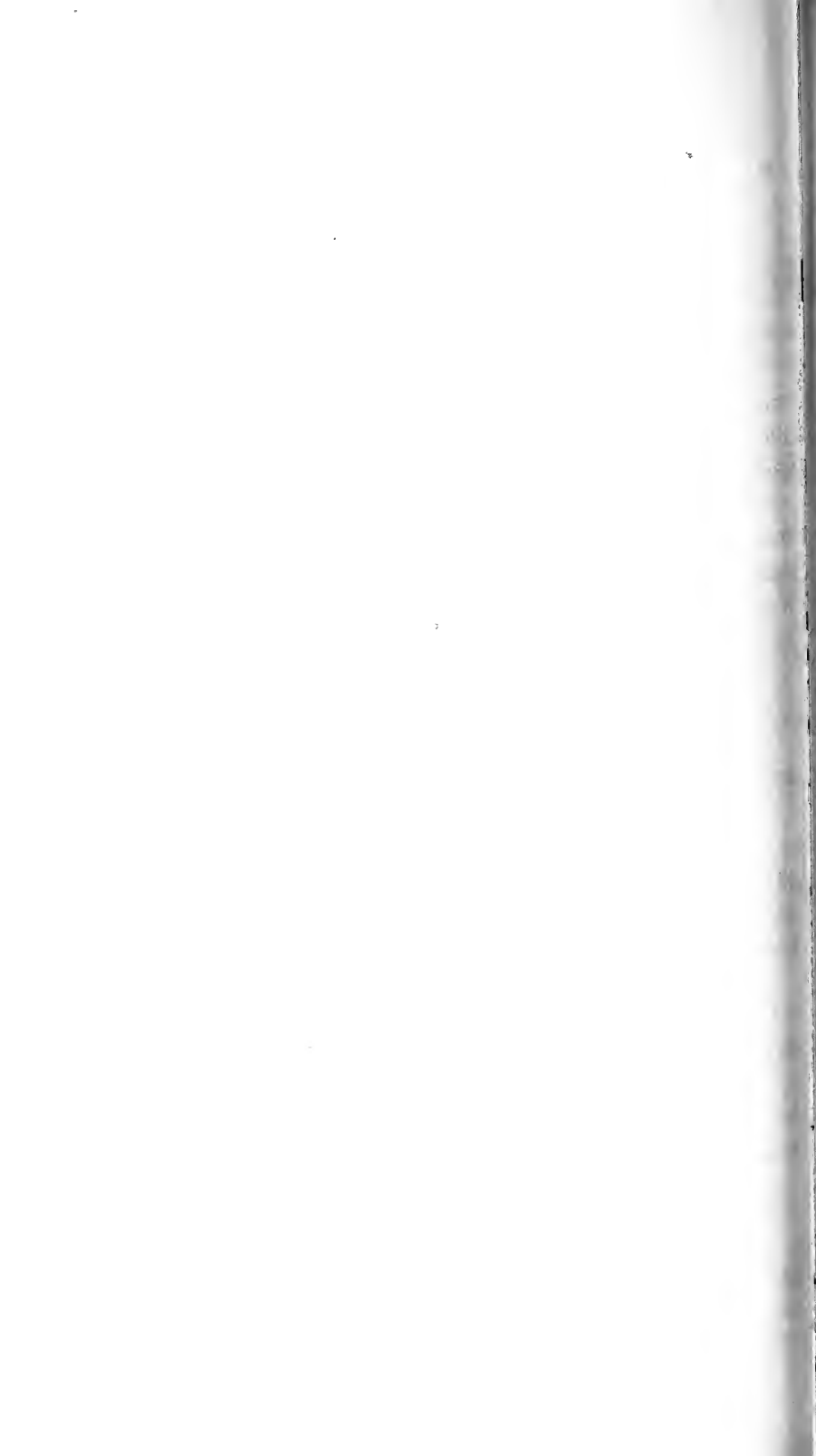
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COMPANY, a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

vs.

THEODORE B. RUSSELL,

*Appellee.*

---

## Reply Brief of Appellant

THEODORE B. RUSSELL

---

### INTRODUCTORY MATTER

In their brief on file herein counsel for the appellee, Northern Pacific Railway Company, devote considerable argument to the proposition that the proviso of the Joint Resolution of May 31, 1870, Resolution 67, 16 Statutes 378,

Study of the brief filed herein by appellee Railway Company leads us to believe that a concise summary of our position in this case may be of considerable assistance to this Court. That position, as clearly as we can state it, is as follows:

1. That by the Granting Act of 1864 the lands involved in this case were granted to the Railroad Company, the predecessor of the appellee Railway Company and that grant was a grant in praesenti but by that grant the Railroad Company did not receive a complete fee simple title in that the settlement and preemption proviso with which we are concerned, applies only to the "place lands" between Portland and Puget Sound, the grant of which is contained within the Resolution, that it does not apply to the "place lands" acquired by the company under the Act of July 2, 1864, Chapter 217, 13 Statutes 365, and that it does not apply to the indemnity lands acquired by the company under the Resolution or the Act.

It is conceded by all parties that the land here involved is "place land" acquired under the Act of 1864 and we contend under the Resolution of 1870. (See p. 9, Brief of Appellee Railway Co.) For this reason we see no necessity of burdening this Court with argument concerning the applicability of the proviso of the Joint Resolution of 1870 to the "indemnity lands" and shall confine our arguments to a consideration of that proviso as it affects the "place lands" acquired by the company.

one of the incidents of an absolute fee, the power to mortgage, was withheld. Further, and incidentally, the grant, while a grant in praesenti, was not a present grant of any specific land.

2. That by the joint resolution of 1870 the railroad was offered a more complete title to the land previously granted removing the limitation contained in the grant of 1864. The grant of 1870 thus being in effect a regrant or new grant to the railroad company applicable to the land previously granted by the Act of 1864.

That the railroad company signified its acceptance of the regrant of a new and more complete title to the lands granted by the Act of 1864 by mortgaging the lands received under the grant of 1864 and that the lands granted by the Act of 1864 thereby became lands "hereby granted" under the Joint Resolution of 1870 and as such subject to the settlement and preemption proviso contained within the Joint Resolution of 1870. That furthermore, both the company and the government have previously recognized the validity of this proposition by virtue of the recitals contained within the place list which constituted the Northern Pacific's selection of the lands here in dispute and in the recitals contained in the patent issued by the government to the Railroad Company, both of which documents are before this Court.

3. That by accepting the Joint Resolution of 1870, as it applied to the lands granted by the Act of 1864 and accept-

ing the regrant of the new and more complete title to the land granted by the Act of 1864 the Railroad Company created a contract between itself and the United States for the benefit of third parties by which it bound itself to dispose of the granted lands as provided in the Resolution of 1870.

4. That the appellee Railway Company, when it succeeded to the rights and privileges of the Railroad Company under the Act of 1864 and the Resolution of 1870 likewise succeeded to its obligations and duties under that Act and that Resolution.

5. That the Act of 1864 and the Resolution of 1870 were and are laws as well as contracts and the purported mineral reservation of the appellee Railway Company in this case is against the law as well as being against the contract.

6. That the reservations, being illegal, are void and must be treated as if they had never existed and the minerals are conveyed by the deed from the Railway Company to appellant's predecessor.

7. That the Railroad Company and its successor, the appellee Railway Company, were bound by the provisions of the Resolution of 1870 to open for settlement and preemption, i. e., to offer to sell to qualified purchasers without reservation and at prices no greater than \$2.50 an acre to be paid to the company. That the well recognized equitable maxim "that which ought to have been done is to

be regarded as done in favor of him to whom and against him from whom performance is due," operates upon the transaction insofar as possible.

Except for the questions raised by the mortgage foreclosure by which the defendant Railway Company appeared on the scene the foregoing points illustrate the position of the appellant Theodore B. Russell and the basis for his claim to title to the minerals purportedly reserved by the appellee Railway Company. As we shall demonstrate, the brief of the appellee Railway Company on file herein misconstrues the position and many of the arguments of the appellant and for that reason much of the argument presented in the brief of the appellee Railway Company is without force.

## **ARGUMENT**

### **I. Settlement and Preemption Proviso Applies To the Lands Here Involved.**

#### **A. Analysis of Land Grant Acts**

##### **1. Act of July 2, 1864 (Chapter 217, 13 Statutes 365).**

Examining the consideration of the original land grant act commencing upon page 11 of the brief of the appellee Railway Company together with their consideration of that portion of our original brief entitled "Nature and Effective Date of the Original Grant of July 2, 1864" commencing on page 51 of the company's brief, there would seem to be a dispute between the appellant Russell and the appellee Railway Company as to the interpretation of the original

Act of 1864. Analysis of the arguments there presented by counsel for the appellee Railway Company illustrate that there is in fact no such disagreement. Counsel for the appellee Railway Company state, at page 11 of their brief, that title to all the granted lands which were "place lands" which were not otherwise disposed of or settled upon or preempted or mineral in character when the line became definitely fixed vested immediately in the company *in praesenti* as of July 2, 1864. This proposition we have never disputed and do not now dispute, nor do we dispute the proposition set forth at pages 51 and 52 of the brief of the appellee Railway Company that there was a transfer of present title as of the date of the grant confirmed by issuance of the patents. What we intended to point out in our original brief was that the Act of 1864 was a grant of the "place lands," *in praesenti*, but that it was a limited grant and that certain obligations were placed upon the Railroad Company which it was bound to meet *in order to be entitled to receive patents* to the land and in that the railroad was forbidden to issue any mortgage or create any liens.

Apparently the argument and disagreement on this point arises out of a difference of opinion as to the proper interpretation of the paragraph in the opinion in *St. Paul & Pacific R. Co. vs. N. P. R. Co.*, 11 Sup. Ct. 389, 139 U. S. 1, 35 L. Ed. 77, set forth at page 22 of our original brief, which quotation we set forth again for the convenience of the Court with emphasis which may clarify our arguments based thereon.

"Although the restraint in the Act against the sale or alienation of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that *the Company, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each 25 mile section was completed and accepted by the President*, so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the Company's failure to comply with its conditions." (Emphasis supplied).

As we stated in our original brief, the condition concerning which the Supreme Court was speaking in the above quotation is unimportant in this action and we present it solely to illustrate the nature of the title acquired by the Railroad Company by the Act of 1864 without more, that is, without action on the part of the company to perfect its grant. Thus, the apparent disagreement between appellant and the appellee Railway Company upon this point, if it is a disagreement, actually need not be considered.

The limitation which we consider important, and which strangely enough counsel for the appellee Railway Company do not choose to discuss, was the limitation placed upon the grant, the provision of the Granting Act of 1864 forbidding the mortgaging or creation of a lien upon the lands granted which is contained in Section 10 of the Act of 1864. Counsel for the appellee Railway Company do not dispute the statement contained in our original brief that the power

to mortgage is an incident of an absolute fee. For this reason we assume that counsel for the appellee Railway Company would agree with this statement.

In Black's Law Dictionary, p. 761, an absolute or fee-simple estate is defined as follows:

"An absolute or fee-simple estate is one in which the owner is entitled to the entire property, *with unconditional power of disposition* during his life, and descending to his heirs and legal representatives upon his death intestate. Code Ga. 1882, Sec. 2246 (Civ. Code 1910, Sec. 3657). And see *Friedman v. Steiner*, 107 Ill. 131; *Woodberry v. Matherson*, 19 Fla. 785; *Lyle v. Richards*, 9 Serg. & R. (AC) 374; *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 So. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Dumont v. Dufore*, 27 Ind. 267; *Alsman v. Walters*, 184 Ind. 565, 106 N. E. 879, 880; *Veseleka v. Forres* (Tex. Civ. App.) 283 S. W. 303, 305; *New Cathedral Cemetery v. Browning*, 153 Mr. 408, 138 A. 258, 260." (Emphasis supplied).

It is clear that the Railroad Company, being forbidden to mortgage, did not receive the title thus defined. The incidents of title not granted to the Railroad Company must then have remained with the original grantor, the United States.

## 2. Joint Resolution of May 31, 1870.

Commencing with page 13 of their brief, counsel for the Northern Pacific consider the Joint Resolution. We agree with much that is said in that portion of their argument. We agree that the resolution made an additional and entirely



new grant of land between Portland and Puget Sound which was not contemplated by the Act of 1864. We do not agree that these lands between Portland and Puget Sound were the only lands embraced within the terminology "hereby granted" as used in the Joint Resolution. Neither do we contend that the settlement and preemption proviso applied to the lands previously granted by the Act of 1864, except in so far as the Railroad Company accepted the grant of new title to these lands contained in the Resolution. Our position in this respect largely destroys the forcefulness of much of the argument advanced by counsel for the Railway Company. The authorities cited and quoted from on pages 16, 17 and 18 are authorities directed to the proposition which we have never disputed, i. e., that the Resolution made an additional grant not previously granted. We should point out, however, that in the case of *Kimes vs. N. P. Ry. Company*, 9 Mont. 573, 144 Pac. 156, cited on page 18 of the Railway Company's brief, the plaintiff was not advancing a claim based upon the settlement and preemption provision of the Joint Resolution of 1870. The case is of little interest to us here for this reason.

Neither is the legislative history of the Joint Resolution discussed, commencing with page 19 of the Railway Company's brief, as persuasive as counsel for the Railway Company contend. Examination of the proceedings in Congress at the places indicated by counsel for the Railway Company revealed that the various amendments to which they refer, which were defeated, were all amendments seeking to apply

the settlement and preemption proviso to the lands previously granted without reference to the Railroad Company's acceptance or rejection of the re-grant, necessarily made by the provision of the Joint Resolution giving to the Company the power previously withheld to mortgage its grant.

In this connection, it is interesting to note that the settlement and preemption proviso, as first proposed, specifically limited its terms to the additional land granted by the Resolution not included in the lands granted in 1864. The proviso originally proposed by Mr. Wilson read as follows:

"The *additional alternate* sections of land hereby granted by this act shall be sold by the company only to actual settlers in quantities not exceeding one hundred and sixty acres or quarter section to any one settler at prices not exceeding \$2.50 per acre." (Emphasis supplied).

See: Congressional Globe, March 2, 1870, page 1626.

Unfortunately the discussions which took place in committee and between various individual congressmen are not available, but certainly it is reasonable to assume that the change in the proviso, from the wording above set forth, to the form which it finally took, is explained by the fact that specifically limited as it originally was, it could only apply to the lands which were not included within the grant of 1864 whereas the Railroad Company, if it mortgaged its lands, was clearly acquiring, under the Resolution of 1870, an incident of title in the land granted by the Act of 1864 which was not granted by the Act of 1864. No other reason-

able explanation for the change from the specific limitation is readily apparent. That the proviso could have been specifically limited to the lands granted by the resolution which were not included within the Grant of 1864, is illustrated by the language originally employed in the proviso as above set forth. Had the legislators so intended, there would seem to be no reason for the change which we have noted.

Under their 4th sub-title of the title "Analysis of Land Grant Acts" commencing at page 26 of their brief and continuing thereafter to page 35, counsel for the Northern Pacific discussed at great length various authorities which they believe illustrate that the proviso does not apply to "indemnity lands." As we pointed out in our introduction to this brief, such argument has no place in this case. The lands involved are conceded by all counsel to be "place lands." Consequently there is no reason to consider this portion of the Railway Company's brief. The status of the "indemnity lands" under the Act and the Resolution is completely outside the issues involved in this case.

### 3. Land Grant Case of 1940

U. S. vs. N. P. Ry. Co., 61 S. C. 264, 311 U. S. 317,

85 L. Ed. 210

Commencing at page 35 of their brief, counsel for the Railway Company present a discussion and consideration

of what they refer to as the land grant case of 1940 resulting from an Act of Congress of June 25, 1929. (46 Stat. 41). Counsel for the Railway Company contend that this case disposed of the questions which are here at issue. That this is not so may be demonstrated by a brief consideration of that case.

The contention advanced by the plaintiff Russell in this case was not squarely presented in the case relied upon by counsel for the Railway Company, the land grant case of 1940. The government's position in that case and the position of Mr. Russell in this case are very different. The following excerpt from the government's brief filed in the land grant case illustrates the position taken by the government as to the effect to be given to the Joint Resolution of 1870:

"It made no segregated grant of land. It changed main line into branch and extended branch line into main line. It granted no separate land subsidy for this. The only grant was one for the whole road from Lake Superior to Puget Sound 'with the \* \* \* grants \* \* \* provided for in its act of incorporation.' This was a unit. To it alone, the proviso applied \* \* \*."

In other words, the government in the Land Grant Case contended that the proviso of the Resolution applied to the place lands granted by the Act of 1864 immediately upon its enactment. We do not agree with that contention. We agree that the Joint Resolution made a new grant not contemplated by the Act of 1864, and we agree with the statement of the Supreme Court which is quoted at page 64 of

the Railway Company's brief, being the third paragraph on said page, as that statement is addressed to the contention advanced by the government in that case.

We have demonstrated, however, that the Grant of 1864 was a limited grant. The Railroad Company's title under that grant was limited in that it could not mortgage or in any way create a lien upon the lands granted by the Act. The Resolution of 1870 was then, in effect, a re-grant of the same land, for it enlarged the Railway Company's title to the land and granted to it a title which it had not theretofore enjoyed. This re-grant or new grant, as to 1864 land, could have been accepted or rejected by the Railroad Company as it saw fit merely by mortgaging or not mortgaging the land. The Railroad Company accepted the re-grant, the new title, and mortgaged the land. But the Congress placed a condition upon the grant made by the Resolution of 1870 and that condition was the proviso regarding preemption and settlement. So they said to the Company—you may mortgage it but if you take advantage of this grant then "all lands hereby granted to said Company, which shall not be sold or disposed of, or remain subject to the mortgage by this Act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said Company not exceeding two dollars and fifty cents per acre." Having taken advantage of the Resolution and accepted the more complete title offered, the Railroad Company, and its successor the Railway Company, were obligated

to accept this burden as well. They must accept the bitter with the sweet.

Counsel for the appellant Railway Company state in their brief that the opinion in the Land Grant Case is one which is extremely complex, complicated and difficult to read, analyze and understand. We subscribe to this statement without reservation. In fact we seriously doubt that the case even went so far as to overrule the contention advanced by the government. Considering the analysis of the case which is presented by counsel for the Railway Company, we find, commencing on page 42 of their brief, they have set forth that portion of the opinion wherein the Court sets forth certain alleged claims of the government and the treatment thereof by the master. As they point out, the fourth point there set forth involved a dismissal by the master of paragraph XIII of the government's complaint. In order that it may be read and considered in connection with our contention, we set forth here that portion of the Railway Company's quotation from that case which refers specifically to this claim:

"4. The claim that the company failed to perform its contract by refusing to open lands granted it by the Resolution of 1870 to settlement and pre-emption at \$2.50 per acre.

"Section 10 of the Act of 1864 provides that 'no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made

in any way, except by the consent of the Congress of the United States.'

"An additional line was authorized by the Joint Resolution of 1870 and a land grant made therefor. The Resolution empowered the company to issue bonds in aid of construction and equipment, and to 'secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation.' The Resolution further provided 'that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre.'

"Paragraph XII of the Bill refers to these provisions of the Joint Resolution and alleges that among the place lands granted there are many million acres the quantity and description of which are known only to the company, or its predecessor, which should have been opened to settlement and preemption whereas they were, subsequent to July 4, 1884, (five years from the date finally fixed for completion of the road), sold at such prices, and on such conditions, as to the company seemed best, and that this was a breach of the company's contract with the United States and defeated the policy of the United States. The master reached the conclusion that the motion to dismiss paragraph XIII should be sustained and the court so ruled.

"The Government insists that the Resolution required the company to hold the lands open for settle-

ment, at the price and in parcels as specified, after five years, whether mortgaged or not; that it failed to do so and sold the lands at higher prices and in larger parcels than the Resolution required, and that its breach of covenant defeats its right to any award. The company contends that the intent of the Resolution was to permit it to mortgage all its property rights; that if, at the expiration of five years from the completion of the road, any of the granted lands were undisposed of, or were not subject to mortgage, those lands were open to preemption; that whether or not the existence of a mortgage prevented settlement of the lands, after five years, there was no duty on the company to dispose of them to settlers; and that the company has not broken any covenant in respect of the lands in question."

After setting forth this issue, and numerous others with which we are not concerned, the Supreme Court, in its opinion said:

"The justices who heard this case are equally divided in opinion upon these issues. No opinion is expressed upon them, and they are reserved, in view of the fact that our rulings on other issues may be dispositive of the entire controversy." (61 S. Ct. 272-276.)

Then at a later point in the opinion, we find the statement upon which counsel for the Railway Company largely rely which is as follows:

"We hold, contrary to the Government's assertion that the proviso of the Resolution of 1870, requiring the lands be opened by the company to settlement and preemption applies only to the additional lands granted by that Resolution and not to lands acquired under the grant of 1864. We hold further that the company was



not a trustee of the lands for the United States either in its own right or in behalf of possible settlers. It results that the Government cannot call upon the company to account as a trustee for the proceeds of sale of the lands."

If anything could be more uncertain in an opinion then we have never encountered it. The last statement above quoted seems clearly to relate to precisely the issue as to which the opinion previously states the justices were evenly divided, and which was reserved. In view of this fact, and in view of the fact previously pointed out that the argument which we advanced was not advanced by the government in the land grant case, it is our feeling that this particular case should be decided independent of the decision in the land grant case. For us now to attempt to reconcile the confusion inherent in the opinion in the land grant case and apply that opinion to an argument not presented in the land grant case, could only result in further confusion.

It seems clear to us that a holding for the appellant Russell in this case would not result in the reversal of any decisions of the Land Department or of the cases referred to by counsel for the Railway Company. As we pointed out, those cases and decisions cited and quoted at pages 27-34 of the Railway Company's brief, are concerned with an issue which is not even remotely involved in this case. The land grant case did not decide the issue here involved. Consequently we see no merit to this contention of counsel for the Railway Company that this Court would have to overrule these decisions or cases in order to find for the appellant.

**B. APPELLEE'S ANSWER TO THE ARGUMENTS  
OF APPELLANT****1: Nature and Effective Date of Original Grant of July 2, 1864**

The remarks of counsel for the appellee Railway Company under the above sub-title are effectively disposed of by our arguments hereinbefore set forth and we see no need to elaborate upon those arguments.

**2: The Joint Resolution of 1870 Constituted a Grant of New Title to the "Place Lands" in Montana.**

Under this heading, counsel for the appellee Railway Company state that their arguments previously set forth sufficiently cover the situation. It is therefore unnecessary that we elaborate upon our discussion of appellee's argument, which is hereinbefore set forth.

At this point in their briefs, counsel for the appellee Railway Company takes up the matter, pointed out in our original brief, that the Railway Company in its place list No. 36 recognized the applicability of the provisions of the Resolution of 1870 to the place land in Montana. Counsel for the Railway Company state that the sole purpose of the place lists was to identify the lands to which the Railway Company claimed title, and for which it desired patent, to obtain the land office certificate and ultimately to obtain the patent. Counsel for the Railway Company state that no consideration whatever of the preemption proviso was involved; that there was no reference to the preemption pro-

proviso, and point out that plaintiff and appellant admits the certification of fact by the land office on the place list. That is, Section 23 was within the place limits was surveyed land, and wholly unclaimed by any other person. From these facts, counsel for the appellee Railway Company conclude that the inference that the Railway Company recognized by its statements in the place list, the applicability of the Joint Resolution of 1870 to the lands granted by the Act of 1864 is not warranted. It is true that the place list did not specifically refer to the preemption proviso; however, the place list relates to place lands only all located in Montana and all of which were lands within the Grant of 1864. We have contended that the Resolution of 1870 was a grant of new title, something the Railway Company did not have, to the lands previously granted by the Act of 1864 and in its Place List No. 36, the Railway Company recited that it made and filed a list of selections pursuant to the Act of 1864 and the Resolution of 1870. Of course, the arguments in our original brief, in connection with this place list, were directed to the proposition that the Railway Company, appellee herein, succeeded to the obligations and duties of the Railroad Company; however, since counsel for the appellee themselves raised the inference that by the place list appellee recognized the application of the Joint Resolution to the place lands in Montana, we insist that the inference is entirely warranted.

In this respect, we might add that the patent, itself,

from the government to the Railway Company which is before this Court, likewise, in its recitals refers to the Joint Resolution of 1870 and like the place lists it conveyed only place lands located in Montana, originally granted under the Act of 1864. It is, of course, a long standing rule that the recitals of a deed are evidence, against the parties thereto at least, of the facts which they recite. See: 32 C. J. S. Evidence, Section 767 (b), page 688 et seq. This patent reciting that the lands are conveyed pursuant to the Act of 1864 and the Resolution of 1870, there is considerable support for a contention that the appellee Railway Company is itself estopped to deny that it held the land or owned the land pursuant to the provisions of the Joint Resolution and that therefore the preemption proviso of the Resolution is applicable to the lands here involved.

**3: By Virtue of the Proviso of the Joint Resolution of 1870, the Purported Mineral Reservation of the Northern Pacific Railway Company Is Void.**

It is argued by counsel for the appellee Railway Company that the settlement and preemption proviso was nothing more than a reservation by the United States of a power of disposition under the preemption and homestead laws with an implied covenant on the part of the Railroad Company to permit such disposition, that plaintiff's predecessors could not complain because they did not meet the requirements of the land laws, that only the United States of America could complain of a failure to permit such set-

tlement and preemption and that no claim or entry was ever filed in the land office by appellant's predecessors. Complete answers to these arguments can be found in the statement from *Oregon & C. R. Co. vs. United States*, 238 U. S. 293, 35 S. Ct. 908, 59 L. Ed. 1360, as follows:

"By the acts of 1866 and 1870 it is provided that upon the survey and location of the roads the government shall withdraw from sale the granted lands, and the provision would seem to withdraw the lands from the specific operation of the Land Laws, and certainly from a complete analogy to them. The public land laws had test of the qualification of settlers under them; they had also the machinery of proof and precaution. When the granted lands were withdrawn from those laws and primarily devoted to another purpose they were committed to another power, to be administered for such purpose, and a discretion in the exercise of the power, within the restriction imposed, was necessarily conferred."

When these lands were granted to the Northern Pacific Railway Company, the public land laws were no longer applicable thereto and the arguments by counsel for the Railway Company, based upon the fact that certain things required by the land laws were not done, is completely untenable.

In support of their contention that a refusal to open the lands to settlement is a breach of which only the United States could complain, counsel for the appellee Railway Company cite *Ore. & C. R. Co. vs. United States*, 238 U. S. 293, 35 S. Ct. 908, 59 L. Ed. 1360. This decision was ex-

amined in our original brief on file herein at pages 27 et. seq., where we pointed out that the proviso of the granting act there involved was a limitation upon the power to sell rather than a mandate to sell. We then point out that the proviso in this case, on the other hand, is a mandate to open the lands to settlement and preemption and that it is such was also recognized by the Supreme Court of the United States in the Land Grant Case when it said:

"A majority of the Justices who heard this case are of the opinion that the proviso of the Resolution of 1870 required the company to open the lands granted by the Resolution to preemption and settlement at the expiration of five years from the completion of the entire line in 1887, whether the lands were then subject to the mortgage or not; that its failure so to do was a breach of its contract with the United States and that the Government is entitled, if it can, to prove any damage to it or advantage to the company, which resulted from this breach of contract."

Commencing at page 60 of their brief, counsel for the appellee Railway Company cite a group of cases including: *Railway Co. vs. Dunmeyer*, 113 U. S. 629, 5 S. Ct. 566, 28 L. Ed. 1122; *Railroad Co. vs. Whitney*, 132 U. S. 357, 10 S. Ct. 112, 33 L. Ed. 363; *Whitney vs. Taylor*, 158 U. S. 85, 15 S. Ct. 796, 39 L. Ed. 906; *Lansdale vs. Daniels*, 100 U. S. 113, 25 L. Ed. 587; *Maddox vs. Burnham*, 156 U. S. 544, 15 S. Ct. 448, 39 L. Ed. 527. The question involved in each of those cases was whether or not the claim of a preemptor or settler under the preemption or homestead laws had attached to the land involved prior to the time

that the particular railroad land grants involved attached. None of these cases involved a claim to land granted to a railroad under the provisions of the granting act, and none of these cases are even remotely in point. Here again counsel for the appellee seem to have completely ignored the fact that, by the granting act, these lands were withdrawn from operation of the land laws. *Ore. and C. R. Co. vs. United States*, *supra*, 238 U. S. 233.

Commencing at page 66 of their brief, counsel for the appellee Railway Company present an argument to the effect that the sale of the land to the appellee Railway Company upon foreclosure of the mortgages of the Railroad Company was a disposal of the lands within the meaning of the Joint Resolution of 1870 and that, therefore, the lands could not thereafter be subject to the proviso requiring that they be opened to settlement and preemption. The Congress of the United States apparently didn't agree with such notion when it said:

"\* \* \* and the passage of this chapter shall not be considered as in any wise evidencing the purpose or intention of Congress to depart from the policy of the United States expressed in the resolution of May 31, 1870, relative to the disposition of grants of lands by said grantee, and the right is hereby reserved to the United States at any time, to enact further legislation relative thereto." 43 U. S. C. A. 923.

The above provision is contained in the act providing for the bringing of the action resulting in the land grant case hereinbefore discussed.

The Railway Company, itself, apparently did not agree with its own contention, now advanced, when it entered into the stipulation by which the land grant case was finally settled. In the judgment entered by stipulation of the government and the defendants in that case, *United States vs. N. P. Ry. C.*, 41 Fed. Supp. 289, it is provided:

"That the plaintiff, United States of America, be and it is hereby awarded judgment against the defendant, Northern Pacific Railway Company, in the sum of \$300,000 together with interest thereon at six per cent per annum until paid."

In their argument on page 59 of their brief, counsel for the Railway Company assert that this three hundred thousand dollar judgment was on account of the failure of the Railway Company to sell the lands pursuant to the proviso. How could there be any such damage if the sale to the Railway Company removed the lands from the operation of the proviso. Furthermore, both the Railway Company and the Land Department have recognized that the Railway Company as a successor of the Railroad Company was acquiring these lands pursuant to the provisions of the act of 1864 and the Joint Resolutions of 1870, as is demonstrated by our discussion of the Company's Place List No. 36 and the patent.

That the Supreme Court of the United States did not agree with this assertion, advanced by counsel for the Railway Company, is illustrated by the statement from the



United States vs. N. P. Ry. Co., *supra*, 311 U. S. 317, to the effect that the proviso required the Company to open the lands to preemption and settlement at the expiration of five years after the completion of the entire line whether the lands were then subject to the mortgage or not. The complete quotation to which we refer is set forth on page 26 of our original brief.

Heath vs. N. P. Ry. Co., 38 Land Decisions 77, cited at page 67 of the Railway Company's brief is not persuasive authority; as admitted by counsel for the Railway Company, the First Assistant Secretary of the Interior affirmed the action of the General Land Office in rejecting Heath's homestead application upon the grounds that the Interior Department was without jurisdiction. This holding was obviously correct without reference to the mortgage foreclosure procedure. See *Oregon & C. R. Co. vs. U. S.*, *supra*, 238 U. S. 393, from which we previously quoted to the effect that by the provision in the land grant act withdrawing from sale the granted lands, the lands were committed to a power other than the government to be administered for the purposes of the Act and were withdrawn from the operation of the land laws. This is the basis of *Heath vs. N. P. Ry. Co.*, and while the First Assistant Secretary of the Interior may have intimated that the sale under the foreclosure proceedings operated as a disposal of the lands within the meaning of the Joint Resolution, the case is not authority for any such proposition.

The position of counsel for the Railway Company is also refuted by one of the very cases which they cited in their brief. On pages 69 and 70 of their brief, they quote from the Forest Reserve Case, 41 S. Ct. 439, 256 U. S. 51, 66 L. Ed. 825, as follows:

"The lands in question are within the indemnity limits of the land grant made to the Northern Pacific Railroad Company by the Act of July 2, 1864, c. 217, 13 Stat. 365, as modified and supplemented by the Joint Resolution of May 31, 1870, 16 Stat. 378, and were selected and patented as indemnity for lands lost within the place limits. The rights *and obligations* of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here for distinguishing one company from the other." (41 S. Ct. 439). (Emphasis supplied).

Under this decision it is clear that the Resolution of 1870 is equally as effective now as it was before the foreclosure.

## II. ESTOPPEL, LACHES, AND STATUTES OF LIMITATIONS

As we anticipated in our original brief, counsel for the appellee Railway Company have advanced, commencing at page 70 of their brief, arguments based upon the doctrines of estoppel and laches and upon the various statutes of limitations. They have, however, made no attempt whatsoever to answer nor even mentioned the holding which we there set forth from *Ore. & C. R. Co. vs. U. S.*, *supra*, 238 U. S. 293, as follows:

"We may observe that the Acts of Congress are laws as well as grants, and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the Railroad Company based on waiver, acquiescence and estoppel and even to the defenses of laches and the Statute of Limitations."

In view of the fact that counsel for the appellee Railway Company have made no attempt to answer this statement by the Supreme Court of the United States as applied to this case, we can only assume that they have no answer and we again submit that this statement is a complete answer to their arguments based upon estoppel, laches, and the various statutes of limitations.

## CONCLUSION

On the basis of the foregoing arguments and authorities and those set forth in our original brief, we again submit that the court below was clearly in error in finding as a matter of law that the mineral reservation of the Northern Pacific Railway Company in the deed to the predecessor of plaintiff and appellant was valid.

REPLY AND ANSWER TO THE BRIEF OF APPELLEE  
AND CROSS-APPELLANT, THE TEXAS  
COMPANY

The following portion of this brief is in reply to the brief of The Texas Company in answer to our original brief on file herein and in answer to that portion of The Texas Company's brief which relates to The Texas Company's cross-appeal from that portion of the judgment granting to the plaintiff Russell the sum of thirty-six hundred dollars on a contract between plaintiff Russell and The Texas Company.

FIRST ISSUE

*Compensation Due Mr. Russell for the Use, by The Texas Company, of the Land in Section 23, Township 17 North, Range 53 East, Dawson County, Montana.*

With respect to our contention that the value for oil well drilling purposes of the lands used by The Texas Company should be considered, counsel for The Texas Company rely principally upon Federal Cases involving condemnation for dam sites. Such cases are clearly distinguishable from the present case in that the only authority that has or could have the right to construct a dam across a navigable river was and is the United States. In other words, the value involved in those cases is one that could never apply to any private person or corporation except by grant from the government. This is not true of the value for oil well drilling purposes involved in the present situation. It is true that if the Northern Pacific Reservation be valid,

the defendant The Texas Company, has the right to take the surface of plaintiff Russell's land for this purpose. But that right is accompanied with the obligation to pay to Mr. Russell the market value thereof and in determining the market value, the fact that plaintiff can not stop The Texas Company from taking the surface must not be considered, and the case must be determined as if defendant, The Texas Company, was a willing purchaser who would not have to buy, and the plaintiff Russell, a willing seller, not obligated to sell. In such situations, the value of the surface for oil well drilling sites would certainly be considered. See the authorities cited in our original brief, particularly *Yellowstone Park Railroad Company vs. Bridger Coal Company*, 34 Mont. 545, 87 Pac. (2d) 963.

A case more nearly analogous to this one than those cited by counsel for The Texas Company is the case of *Mississippi Run River Boom Company vs. Patterson*, 98 U. S. 403, 25 L. Ed. 206; which case involved a situation wherein a company which had been granted a franchise by the State of Minnesota to construct logging booms on the Mississippi River was condemning for that purpose an island owned by one Patterson. In that case the Supreme Court of the United States said:

"The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty million feet of logs, added largely to the value of the lands. The Boom

Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands. \* \* \*

"The views we have expressed as to the justness of considering the peculiar fitness of the lands for particular purposes as an element in estimating their value, find support in the several cases cited by counsel. Thus, in the matter of Furman Street, 17 Wend. 669, where a lot upon which the owner had his residence was injured by cutting down an embankment in opening a street in the City of Brooklyn, the Supreme Court of New York said that neither the purpose to which the property was applied, nor the intention of the owner in relation to its future enjoyment, was a matter of much importance in determining the compensation to be made to him; but that the proper inquiry was 'What is the value of the property for the most advantageous uses to which it may be applied?' In *Goodwin v. Canal Co.*, 18 Ohio St. 169, where a railroad company sought to appropriate the bed of a canal for its track, the Supreme Court of Ohio held that the rule of valuation was what the interest of the canal company was worth, not for canal purposes or for any other particular use, but generally for any and all uses for which it might be suitable. And in *Young v. Harrison*, 17 Ga. 30, where land necessary for an abutment of a bridge was appropriated, the Supreme Court of Georgia held that its value was not to be restricted to its agricultural or productive capacities.

but that inquiry might be made as to all purposes to which it could be applied, having reference to existing and prospective wants of the community. *Its value as a bridge site was, therefore, allowed in the estimate of compensation to be awarded to the owner.*" (Emphasis supplied).

On the basis of this case and of the cases cited in our original brief, we again submit that the value of these lands for oil well drilling purposes should have been considered.

With reference to the opinion of the witness Morton and the foundation which was laid therefor, we have no quarrel with the authorities cited by the counsel for The Texas Company, but we must insist that the facts upon which Morton's testimony were based were adequately presented. These facts were the production record of the wells on plaintiff's lands (Pl. Ex. 10), and the fact that only the surface was owned by the plaintiff Russell and that only the surface was being valued. From these two facts, based upon his experience in the oil business, Mr. Morton could, under the authorities cited by counsel for The Texas Company, properly testify as to the value of the area taken for oil well drilling purposes. In regard to the fact that his testimony was not specifically directed to the time when mining activities were commenced, it is our contention that the production record of these three wells is certainly some evidence of the expectations which would have governed the market value at that time. This record is, of course, the realization of those expectations. Furthermore, the three wells on Mr. Russell's lands were not all

drilled at one and the same time. The dates when they were drilled and the dates when operating for drilling them commenced are before this Court in the admissions and answers to interrogatories (R. 94), and at the time drilling operations were commenced on the lands taken for the second well and the third well, the productivity of the area had, of course, been established by the first well. For all these reasons, we respectfully submit that the testimony of Mr. Morton is of value in arriving at the market value of the surface taken by the defendant, The Texas Company.

## SECOND ISSUE

### Right to the Use of Surface Water on Section 23.

As anticipated in our original brief, counsel for The Texas Company now argue that the water used by them from the plaintiff's Section 23 was owned by them. This contention now advanced by counsel for The Texas Company can not be considered for three reasons: First: It constitutes a variance from their pleading. Second: The waters involved were surface waters not subject to appropriation. Third: The Texas Company was without right to make an appropriation upon the plaintiff's land.

It is the general rule in Montana, as elsewhere, that parties to an action are bound by their pleadings and can not controvert their averments; allegations, statements, or admissions contained in a pleading are conclusive against the pleader as proof of the facts which they admit. *Gilna vs.*



Barker, 78 Mont. 357, 254 Pac. 174. Andersen vs. Mace, 99 Mont. 421, 45 Pac. (2d) 771. In Paragraph IV of the plaintiff's third causes of action on page 9 of the plaintiff's complaint (Rr. 13-14) it is alleged that the defendants have since, on or about the third day of September, 1952, taken and removed water from the plaintiff's lands for uses upon other lands and that the taking and removing of said water for use upon other lands is without right or authority and is a wrongful invasion of the rights of the plaintiff and a continuing trespass upon the lands of the plaintiff. In paragraph IV of their answer to the third cause of action in plaintiff's complaint, the defendant Texas Company admits as follows:

"\* \* \* admit the use of said roads, *water*, and rock for access to and use upon adjacent lands was wrongful; \* \* \*." (R. 35).

In the face of the admission and allegation above set forth we fail to see how The Texas Company can now contend that its use of water from plaintiff's Section 23 was rightful. Counsel for The Texas Company may argue that this admission, being an admission that the use of the water on lands other than Section 23 was wrongful does not preclude them from asserting that the use upon Section 23 was rightful. However, as they themselves suggest at a later point in their brief, to which reference will be made, if they owned the water by right of appropriation, they would have the right to use it at any place they might see fit, so far as Mr. Russell was concerned. Consequently,

it is clear that this admission not only precludes them from argument that the use of the water on land other than Section 23 was within their right, but also precludes them from advancing this argument as to the use of the water on Section 23.

The claim of right advanced by counsel for Texas Company is based upon the theory that the water was water subject to appropriation, that they were rightfully upon the land and therefore had the right to appropriate it. The waters used by The Texas Company were surface waters. This fact they may not now deny. See admissions and allegations contained in Paragraph IV of The Texas Company's answer to the third cause of action in plaintiff's complaint (R. 35), wherein they admit and allege that they "used surface water" from said lands. Section 89-801 R. C. M. 1947, provides as follows:

"The right to the use of unappropriated water of any river, stream, ravine, coulee, spring, lake, or other natural source of supply may be acquired by appropriation, and an appropriator may impound flood, seepage, and waste waters in a reservoir and thereby appropriate the same."

See the recent case of *Doney vs. Beatty*, 124 Mont. 41, 220 Pac. (2d) 77, holding that surface waters are not subject to appropriation. The rule has long been that surface waters are the absolute property of the land owner so long as they remain upon his land and under his control. This being so, plaintiff Mr. Russell, could impound the waters,

use them to irrigate crops, sell them or simply pay no attention to them. See Kinney on Irrigation and Water Rights, Vol. 1, Second Edition, Section 318, pages 516-519.

The right of The Texas Company in this case under the reservation of the defendant Northern Pacific Railroad Company, assuming that reservation to be valid, is only to the use of so much of the surface of plaintiff's land as may be necessary for their drilling operations subject to their obligation to pay to Mr. Russell the market value of the surface which they used. If these surface waters be considered a part of the surface, The Texas Company became obligated under the reservation to pay the reasonable value thereof. If they be considered property of the plaintiff, separate and apart from the surface of the land, The Texas Company, by its use of the water, is nonetheless obligated to pay the reasonable market value thereof.

Furthermore, even if this water be considered subject to appropriation by The Texas Company, which it can not in view of The Texas Company's admissions, The Texas Company's only right on the land of the plaintiff, assuming that it has any right, is for the purpose of searching for and recovering oil and gas and other minerals. There is no right reserved and there has been none granted to go upon the lands of the plaintiff for the purpose of making an appropriation of water. The only legitimate use which can be made of the reservation upon which The Texas Company relies is to search for and recover such oil and gas and

other minerals. See 3 Lindley on Mines, Section 813, Page 2006, 28 C. J. S. Easements, Section 92; 58 C. J. S. Mines and Minerals, Section 159. In this respect, we again respectfully submit that the case of *Prentice vs. McKay*, 38 Mont. 114, 117, 98 Pac. 1081, is controlling and the case of *Connolly vs. Harrel*, 102 Mont. 295, 57 Pac. (2d) 781, cited by counsel for The Texas Company at page 23 of their brief, is not authority to the contrary. In the *Connolly* case there was a license to go upon the lands involved for the specific purpose of appropriating water. The licensee, therefore, having the right to make a valid appropriation. The *Connolly* Case, while distinguishing the rule of *Prentice vs. McKay*, specifically recognizes that rule to the effect that one cannot make valid appropriations of water upon the lands of another without some right to be there for the purpose of making said appropriation.

### THIRD ISSUE

#### *Cross-Appeal by The Texas Company.*

The Texas Company has appealed from that portion of the judgment awarding the plaintiff Russell the sum of \$3600.00 under a contract. The Texas Company's arguments in support of that appeal commence at page 25 of the brief of the appellee and cross-appellant The Texas Co. This portion of our brief is in answer to the arguments there set forth.

The statement set forth by counsel for the cross-appellant The Texas Company as to the facts concerning which there is no dispute, pages 25, 26 and 27 of The Texas Company's brief, is not entirely accurate. Counsel for The Texas Company state that on or about the 17th day of April The Texas Company constructed a dam creating a reservoir on the plaintiff's land in which it gathered and impounded surface water coming down the hill from Section 26 and used about 15,000 barrels of that water for drilling operations in Section 22 between September 14, 1952, and November 12, 1952. They state that no water was ever taken from Section 23 for use on either Section 23 or Section 22 or any other land, citing the court to page 74 of the Transcript which is defendant's answer to interrogatories. The answers to the interrogatories to which they direct the attention of the Court do not state that no water was taken from Section 23 for use on either Section 22 or on any other land. They state that the defendant constructed a dam in the SW<sup>1</sup>/<sub>4</sub> of the SW<sup>1</sup>/<sub>4</sub> of Section 23 into which drained the runoff of free surface waters coming downhill from Section 26; that the defendant pumped about 15,000 barrels of that water from the dam on Section 23 for use in drilling on Section 22 between September 14, 1952, and November 12, 1952. They then state "no *other* water was taken from Section 23." Now, of course, whether this water originated in Section 26 or some other section it was on Section 23 when impounded by the defendant The Texas Company and it was from Section 23 that it was taken. Furthermore,

at least a portion of this water originated on Section 23. See the testimony of Bert Ekland (R. 224).

Counsel for cross-appellant The Texas Company refer at page 26 of their brief to the letter from Vaughn, Brandlin & Wehrle upon which letter Mr. Russell bases his claim of contract. They then state that this letter was not answered until The Texas Company wrote to Mr. Russell's attorney under date of December 16, 1952, refusing to consider the offer made by Mr. Russell. It should be pointed out that this letter of refusal, dated December 16, 1952, actually was not mailed to Mr. Russell until December 26, 1952, which date is the date postmarked on the letter (R. 85). Long prior to this time and on November 22, 1952, as stated by counsel for cross-appellant The Texas Company at page 27 of their brief, The Texas Company had ceased to make use of Mr. Russell's land in connection with their operations upon other lands. At this point we might remark that we do not see any valid criticism of Finding of Fact No. XIV there criticized by counsel for cross-appellant. That Finding is precisely correct for the cross-appellant did continue to use the roadways, water and rock from plaintiff's said lands in connection with its operations on adjacent lands from and after the 30th day of October, 1952, and they did stop all such use on November 22, 1952, and not before although the use of rock and the use of water was terminated on different dates during the interim.

It is contended by cross-appellant The Texas Company that the continued use of the roadways from Section 23 and the water produced and impounded on Section 23 on adjacent sections after October 30, 1952, constituted no consideration whatever for the alleged promise by The Texas Company to pay Russell \$150.00 per day for such use. We need not go outside the brief of cross-appellant for our answer to the arguments presented in support of this contention. Each of those arguments contains within itself the seeds of its own destruction. This is particularly true of the various authorities cited by counsel for the cross-appellant.

First, counsel for the cross-appellant suggest in support of this contention that because Russell was granted judgment against the company for the "full market value" of 23.67 acres of section 23 used by The Texas Company there is no consideration. Now, in the first place, The Texas Company admitted and has never denied that this use of plaintiff's property in connection with its operations upon other lands was wrongful and not justified under the reservation which they claim to be the basis of their right (R. 33-34). If The Texas Company had any right at all on the lands of the plaintiff it was only in connection with their operations upon those lands. Consequently, their use in connection with their operations upon other lands would properly have been the subject of bargaining between The Texas Company and Mr. Russell and such use without agreement from Mr. Russell rendered The Texas Com-

pany common trespassers. Insofar as the payment of the full market value for the 23.67 acres is concerned it is conceded that utility of the 23.67 acres to Mr. Russell was completely destroyed. Consequently, Mr. Russell was clearly entitled to that compensation and as previously noted The Texas Company has admitted that he was entitled to compensation as well for the use of his property in connection with The Texas Company's operations upon other property.

Insofar as the argument advanced by The Texas Company that the water impounded on Section 23 belonged to The Texas Company and could be used at any place or location is concerned, that argument now advanced is completely at variance with the admissions contained in their pleading, previously pointed out, wherein The Texas Company specifically "admits the use of said road, water and rock for access to and use upon adjacent lands was wrongful." (R. 35). In the face of this admission The Texas Company may not now argue that the water was theirs to use where they saw fit.

Counsel for cross-appellant The Texas Company next point out the fact that Section 23 was under lease to Mr. Ekland and they therefore argue that Mr. Russell had no power to make the contract. As counsel for the cross-appellant themselves point out later on, this lease to Mr. Ekland was a grazing lease and Mr. Ekland having leased only the grazing rights would be in no position to complain concerning the contract. At any rate Mr. Ekland is not here complaining and there is no showing as to the



terms of his lease other than that it was a grazing lease. Mr. Russell made an offer to The Texas Company. The Texas Company accepted that offer in conformity with the mode of acceptance specified in the offer and there is no issue as to the rights of Mr. Ekland.

Counsel for The Texas Company continually refer to the contract as an unconscionable contract. Now, if there were any unconscionable conduct involved in this case it certainly was not the conduct of Mr. Russell. The letter containing the offer to The Texas Company was dated October 28, 1952, and should have been received by The Texas Company in due course not later than the 30th day of October, 1952, and here we might remark that The Texas Company does not anywhere in their pleadings, or otherwise, dispute that they did so receive the letter. Thereafter, according to their own admissions, they continued the use, which they admit was wrongful, insofar as the water was concerned until November 12, 1952, and insofar as the roads are concerned until November 22, 1952. This, without answering in any fashion Mr. Russell's letter. Bob Traver, a witness for the defendant The Texas Company, testified that immediately after they received notice to stop using the roads they commenced building a new road and that it took just three or four days for them to build the new road (R. 216-217), that the order to stop using the road was from the company (R. 219), that the road was finished in November when they stopped using the road on Mr. Russell's land (R. 220). In other words, for a period of twenty to twenty-one days after receipt of the letter de-

dendant The Texas Company continued the wrongful use and they now contend, with no intention whatsoever to accept Mr. Russell's offer, without even attempting to make arrangements to avoid such wrongful use. We might further point out that it was not until December 26 thereafter that The Texas Company finally communicated to Mr. Russell that they did not intend to accept or that they refused to consider the offer made by Mr. Russell. In other words, by their pleadings and by their testimony they admit a willful trespass and continuation of that willful trespass, after notice, with no attempt, for a period of twenty to twenty-one days at east, to comply with such notice and with no notification that the offer made with the notice would not be considered and no communication whatsoever with Mr. Russell until more than a month subsequent to the discontinuance of their willful trespass. Now, we ask the Court if anyone here is guilty of unconscionable conduct is it The Texas Company or is it Mr. Russell? We are confident that this Court will have no difficulty in answering that question.

Insofar as the point pointed out by counsel for the cross-appellant The Texas Company that the plaintiff in the complaint asked for an injunction we need only call this Court's attention to the fact that the license offered was a revocable license. It would seem to make no difference as to how Mr. Russell chose to revoke that license.

Commencing with page 31 of the brief, counsel for the cross-appellant, The Texas Company, present a considera-

tion of the various authorities which they believe support their position. At that point they state that we rely solely on the provisions of Section 13-320 R. C. M., 1947. In this statement they are incorrect. Not only did we cite to the Court in addition Section 13-325 R. C. M., 1947, but furthermore, as we will show, the authorities generally, including those cited and quoted from by counsel for the cross-appellant support our position. Counsel for the cross-appellant first consider Section 13-317 R. C. M., 1947, specifying that consent can be communicated with effect only by some act or omission of the party contracting by which he intends to communicate it or which necessarily tends to such communication. The last phrase in this statute clearly implies that actual intention is not essential. The intention of the cross-appellant is important only as it is manifested.

On page 32 of their brief, counsel for the cross-appellant cite and quote Section 55 of the Restatement of the Law of Contracts, which seems to support their position. However, they then proceed to quote at some length from the Montana Annotation to that Section of the Restatement. Considering that quotation, we find therein authoritative support for our position.

"No case found. The rule *accords* with the language of cases involving bilateral contract which say that there must be mutual assent to form a contract, or that the parties must give their free and voluntary assent to the terms. (Citing cases). But in accord with Sections 20 and 23 of the Restatement, J. Neils Lumber

Co. v. Farmers' Lumber Co., supra, indicates that, despite the statement made to the contrary, in a bilateral contract *it is not necessary that the party intend to accept an offer provided he has manifested an intention to accept*. Section 55 in reality therefore lays down an additional requirement of accepting the offer. Since an act is equivocal it seems reasonable to require proof of intent." (Emphasis supplied).

In this particular case, the actions of the cross-appellant clearly manifest an intention to accept. The mode of acceptance was specified in the offer. Had the cross-appellant merely remained silent, we agree that no contract would have been formed. However, the mode of acceptance set forth in the offer calls for affirmative action on the part of cross-appellant and cross-appellant does not deny that affirmative action in accord with the offer was taken.

Counsel for cross-appellant cite and quote at length Section 72 of the Restatement of Contracts. Here also we find support for our position. Of course, that section of the Restatement is not precisely applicable since it deals with situations involving silence and *inaction* on the part of the offeree. Whereas in the present case, we are relying upon silence and affirmative action. The first example set forth in Section 72 as illustrative of situations wherein silence and inaction on the part of the offeree constitute an acceptance of the offer, is as follows:

"(a) Where the offeree with reasonable opportunity to reject offered services takes the benefit of them under circumstances which would indicate to a

reasonable man that they were offered with the expectation of compensation."

Certainly in this case the cross-appellant had a reasonable opportunity to reject the offered license. Instead of so doing, cross-appellant did that very thing which the offeror, Mr. Russell, had stated would constitute an acceptance.

Counsel for the cross-appellant rely upon Williston On Contracts Revised Edition. They cite and quote from Section 64, Section 67, Section 91, and Sections 91B and C. In connection with Section 67, an example is set forth in support of the proposition that the performance of an act requested by the offeror does not necessarily indicate assent to the offer. We agree that in the situation there set forth performance of the act is no indication of assent, but obviously the example has no relation to the facts here presented. In the example, the offeree confers a benefit upon the offeror instead of accepting a benefit from the offeror. Changing the example somewhat so that it more nearly approximates the facts here involved, let us suppose that the offeror, instead of offering a reward to the finder of the watch, offered to pay someone to search for the watch. Surely even counsel for the cross-appellant would not argue that acceptance of the pay by the offeree did not constitute an acceptance by the offeree of the proposition. At another point in this very valuable work, we find the following statement:

"Since, however, the formation of such contracts depends not upon an actual meeting of the minds, but

merely upon manifestations of assent. It is not true that an intention to accept is of any importance except where the actions or words of the offeree are ambiguous." Williston on Contracts, Revised Edition, Volume 1, Section 166.

In this case there was nothing ambiguous in the action of the cross-appellant. Its conduct clearly met the terms of the offer and constituted an acceptance thereof. The sections from Williston on Contracts cited by counsel for cross-appellant to the effect that mere silence does not constitute an acceptance of the offer are correct. However, these authorities have no application in this case because in addition to mere silence on the part of cross-appellant, the record shows there was affirmative action on its part in continuing the use of Mr. Russell's land in connection with its operations on adjacent lands. Cross-appellant had no right to use Section 23 belonging to Mr. Russell in connection with operations on adjacent lands. The right to grant permission to use Section 23 in connection with operations on adjacent lands rested exclusively with Mr. Russell and he could grant that right upon any terms he desired. The offer of the right made to the cross-appellant included the stipulation that the continued use of Mr. Russell's Section 23 in connection with operations on adjacent lands would be taken as an acceptance of the offer and the cross-appellant continued in its use of Section 23 in connection with its operations on adjacent lands.

Counsel for the cross-appellant acknowledged that Mr. Russell might bring action (ex contractu) for the reason

able value of the use of his property, but they argued that he may not convert the use into an express contract calling for a daily rate of payment of his own choosing, which sum might as well have been fifteen thousand dollars a day as one hundred fifty dollars a day. To be sure the sum might as well have been fifteen thousand dollars a day as one hundred fifty dollars a day, but there was no coercion employed which would have forced the cross-appellant to continue their wrongful use of plaintiff's land. That was a matter of free choice on cross-appellant's part. Suppose that an offeror proposes to an offeree that he rent to the offeree an apartment at a rental of one hundred fifty dollars a month. Suppose further that he makes this offer by letter as was done in this case, informs the offeree as to the location of the apartment and the key thereto and tells him that if he accepts he may move right in. Suppose then the offeree, without communicating with the offeror, moves into the apartment and lives there for a month. Surely counsel for the cross-appellant could not agree that at the end of the month the offeree could remove himself from the apartment, inform the offeror that he considered one hundred fifty dollars per month unconscionable and would pay him only the reasonable rental value of the apartment. Such is precisely the argument now advanced by counsel for the cross-appellant. When a fruit vendor places a box of oranges on the street with a sign thereon specifying the price for each orange—that is an offer to the

general public. Surely counsel for the cross-appellant cannot agree that when I take one of those oranges I am not bound to pay the price stipulated, but only the reasonable value of the orange.

We think it is unnecessary to argue the point as to whether or not Mr. Russell was unreasonable in stipulating as his price for the license the sum of one hundred fifty dollars per day. Cross-appellant could not have considered it too unreasonable at the time for as previously pointed out, it continued the wrongful use for a period of twenty-one days after receiving the letter containing the offer, without taking any steps to cease and desist from such wrongful use. I cannot take the fruit vendor's orange knowing that such action led him to believe that I accepted his offer and rely in my mind upon an intention, not expressed, to pay him only the reasonable value therefor. The examples which we have set forth may be ridiculed by counsel for the cross-appellant as far-fetched, but we submit the situation here presented reduced to its simplest terms, is on all fours with these examples.

Counsel for the cross-appellant cite two California cases which they conceive to be applicable here. Analysis reveals that both of those cases are clearly distinguishable. In the first case, *Wright v. Sonoma County*, 156 Cal. 475, 105 Pac. 409, was the situation wherein there was no offer whatsoever; there was never any assent on the part of the plaintiff in that case to the use by the defendant. The notice given



the plaintiff expressly forbade such use and stated that if the notice was disregarded, the plaintiff and his co-owners hereby demand fifty dollars per day for each and every day of such use in violation of the notice as compensation for the use. As stated by the Court in that case, this demand can not be considered a proposition to allow such use at that rate. It amounted to no more than a notice of the amount of damage that the plaintiff and his co-owners would demand for the use without their consent. In this case, there was a specific and definite offer.

The second case cited by counsel for the cross-appellant: *Man v. Assoc. Tel. Co., Ltd.*, 100 Cal. App. (2d) 806, 236 Pac. (2d) 846, also involved a situation wherein there was no offer on the part of the plaintiff. The plaintiff merely informed the defendant that unless the encroachment infringed in that case were removed within three days after notice, the plaintiff would charge defendant twenty-five dollars per day for each day thereafter that the encroachment continued.

To summarize our arguments, this is a situation wherein there is more than mere silence or failure to reject the offer. There was that which is required by Section 13-320, R. C. 1947, i. e., acceptance of the consideration offered with a proposal.

Counsel for The Texas Company have pointed out that we built by-pass roads after receipt of the letter. We fail

to see how The Texas Company could relieve itself by proceeding in such fashion. The Texas Company was making use of the lands of the plaintiff for a purpose which they admit was wrongful. The plaintiff demanded that such use cease and in the same letter offered them a revocable license to continue such use at a stated consideration specifying that continuation of the use by The Texas Company would be deemed an acceptance of the offer. The Texas Company now argues that they could, after receipt of this demand and offer, in their own good time make other arrangements satisfactory to themselves and then say to the plaintiff—your offer is refused, come ahead and see how much damage you can prove. This argument merits the respectful consideration of a Jesse James or John Dillinger, but it is hardly the sort of an argument calculated to appeal to a Court of Justice, and we submit that the local Court's judgment in so far as it recognizes the formation of this contract by Mr. Russell and The Texas Company must be affirmed.

## CONCLUSION

On the basis of the foregoing arguments and authorities and the arguments and authorities set forth in our original brief, we again submit that the appellant was entitled to recovery against The Texas Company for the use of his lands, and water and materials from his lands, in connection with The Texas Company's operations upon adjacent lands

prior to the offer of the revocable license. We further submit that the lower Court clearly erred in allowing to the plaintiff only the sum of ten dollars per acre for plaintiff's lands utilized by The Texas Company.

Respectfully submitted,

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# United States Court of Appeals

*for the Ninth Circuit*

---

THEODORE B. RUSSELL,

*Appellant,*

*vs.*

THE TEXAS COMPANY, a corporation; FREDERICK T. MANNING DRILLING COMPANY, a corporation and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

*vs.*

THEODORE B. RUSSELL,

*Appellee.*

---

## Petition for Rehearing

---

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FILED

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# United States Court of Appeals

*for the Ninth Circuit*

---

THEODORE B. RUSSELL,

*Appellant,*

*vs.*

THE TEXAS COMPANY, a corporation; FREDERICK T. MANNING DRILLING COMPANY, a corporation and THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation,

*Appellees.*

THE TEXAS COMPANY, a corporation,

*Appellant,*

*vs.*

THEODORE B. RUSSELL,

*Appellee.*

---

## Petition for Rehearing

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*To the United States Court of Appeals for the Ninth Circuit and the Judges thereof, to-wit: the Honorable Circuit Judge Stephens, the Honorable Circuit Judge Bone and the Honorable District Judge Halbert, the Judges constituting the said Court at the original hearing upon this appeal.*

Comes now Theodore B. Russell, the appellant in the above entitled cause, and presents this, his petition for a rehearing as to that portion of the above entitled appeal

relating to the appeal by petitioner from the judgment in favor of the appellee, the Northern Pacific Railway Company, a corporation, and in support thereof respectfully shows:

I.

The opinion and decision of this Honorable Court appears to be based principally upon the doctrines of estoppel. The judgment in favor of the appellee, Northern Pacific Railway Company, was a judgment rendered upon motion for partial summary judgment in the Court below. The law in such cases requires that before such a motion may properly be granted it must clearly appear that there is no issue of fact and the burden is upon the moving party to establish the absence of such an issue. Any reasonable doubt in that connection must be resolved in favor of the party resisting the motion. The point to be determined on motion for summary judgment is whether there is a real issue existing and in doing this all doubts are resolved against the movant.

Fairbanks Morse & Co. v. Consolidated Fisheries Co., 190 Fed. (2d) 817, 824;

Lande v. Silverman, 189 Fed. (2d) 80, 82;

Ford v. Luria Steel & Trading Corp., 192 Fed. (2d) 880, 882;

Snyder v. Dravo Corporation, 6 F.R.D. 546, 549;

Thomas v. Martin, 8 F.R.D. 638;

St. Louis Fire & Marine Ins. Co. v. Witney, 96 Fed. Supp. 555;



U. S. v. Haynes School District No. 8, 102 Fed. Supp. 843, 848.

The general rule is that estoppel is a question of fact requiring a showing by the party asserting the estoppel of the facts to establish the defense and the burden of proof rests upon the party asserting the estoppel.

19 Am. Jur., Estoppel, Sec. 200, p. 856, and cases there cited including Dowling v. National Exchange Bank, 145 U. S. 512, 36 L. Ed. 795, 12 Sup. Ct. 1298;

19 Am. Jur., Estoppel, Sections 198 and 199, pp. 852, 853, 854, and cases there cited.

It necessarily follows that the party against whom the estoppel is asserted is entitled to meet the evidence relied upon as establishing estoppel by proper rebuttal evidence on the trial of the issue. In other words, where the estoppel is asserted it would seem that an issue exists as to which the party resisting the asserted estoppel is entitled to his day in court. In this connection, it makes no difference that it might appear that such party is unlikely to prevail upon the trial.

Sprague v. Vought, 150 Fed. (2d) 795, 801.

With further reference to the question of estoppel, it is also elementary that a void instrument, or provision therein, cannot operate as an estoppel.

19 Am. Jur., Estoppel, Sec. 8, p. 605.

It has, of course, been and now is our contention that the purported reservation upon which the Railway Company founds its claim and upon which this Court apparently bases its conclusions upon the doctrine of estoppel is void as contrary to the law. We cited to the Court the case of

Oregon & C. R. Co. v. U. S., 238, U. S. 393, 59 L. Ed. 136.

wherein the Supreme Court of the United States held that these granting acts are laws as well as contracts and have the force and effect of law. Such being the case, under the general rule that the law relative to a contract becomes a part of the contract.

12 Am. Jur., Contracts, Sec. 240, p. 769, and cases there cited;

Valier County v. State, 123 Mont. 329, 215 Pac. (2d) 966, Cer. Denied, 71 Sup. Ct. 63, 340 U. S. 827, 95 L. Ed. 607,

the proviso of the Joint Resolution of 1870 must be read into the deed to appellant's predecessor and the reservation being in conflict therewith must fail. This proposition also results in the destruction of arguments based upon the rule adverted to by the Court to the effect that in actions to quiet title or remove a cloud upon the title the plaintiff must succeed on the strength of his own title and not upon the weakness of the defendant's title.

With further reference to the matter of estoppel we take it as elementary that one who is asserting a legal position based upon estoppel must as a condition thereto show the equity of his position. The maxim being that he who seeks equity must do equity and that he who seeks equity must come with clean hands. This, we contend, the Railway Company is utterly incapable of doing, its sale to Mabelle Cobb and the form of its deed being directly in conflict with the legislative intent, which observation brings us to a consideration of the legislative history of the act referred to by this Court in foot note No. 4 of its Opinion.

## II.

It should be noted that the particular land here involved was not land which was earned or to which the grant had become fixed at the time of the Joint Resolution of 1870. See paragraph IV of the Separate Answer of the Northern Pacific Railway Co., R. 38-41.

The congressional history is understandable when considered in light of the fact that as to certain of the lands granted by the Act of 1864 the grant had become fixed at the time of the Joint Resolution. The Congress understandably took the position that to impose new conditions upon the railroad's title to such land would be unjust. Based upon this congressional history it has been contended that the words "hereby granted" used in the proviso of the Joint Resolution by the Congress could only be applied to the additional lands in Washington and Oregon granted

by the Joint Resolution and that the regrant theory advanced herein by the appellant is thereby destroyed. However, in the Joint Resolution we find further employment of the words "hereby granted" which destroys this position and reinforces the position of the appellant as to appellant's regrant theory.

The Congress, in the Joint Resolution, in providing for foreclosure of the mortgage permitted by the Joint Resolution, used the following language:

"\* \* \* and if the mortgage hereby authorized shall at any time be enforced by the foreclosure or other legal proceedings, or the mortgaged lands *hereby granted*, or any of them, be sold by the trustee to whom such mortgage may be executed, either at its maturity or for any failure or default of said company, under the terms hereof, *such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate*, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder." (Emphasis supplied).

The use of the plural reference to states and territories indicates clearly that the words "hereby granted" in the above quotation refers to all of the lands acquired by the railroad whether granted by the Act of 1864 or the Resolution of 1870. If we assume that the Congress by the use of the words "hereby granted" in the proviso meant to refer only to the new "place" lands then we must assume that the Congress considered the lands here involved to be

lands "hereby granted" for one purpose and not for another. The illogic of this position is readily apparent.

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for rehearing be granted and that in order that the congressional intention that the railroad grant land should be made available to the general public at a maximum consideration within a specified period of years may be accomplished, the Judgment of the District Court of the United States in and for the District of Montana be, upon further consideration, reversed.

Respectfully submitted,

RALPH J. ANDERSON,

STANLEY P. SORENSON,

*Attorneys for Appellant.*

---

### CERTIFICATE

I, Ralph J. Anderson, do hereby certify that I am one of the counsel for Theodore B. Russell, the appellant in the above entitled action, and that the foregoing Petition for Rehearing is not interposed for purposes of delay but is presented in good faith and in my judgment is well founded and proper to be filed herein.

RALPH J. ANDERSON.



No. 14985.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT.

---

ABRIAN SCOTT,

*Appellant,*

*vs.*

KO RADIO PICTURES, INC., a corporation,

*Appellee.*

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## APPELLANT'S OPENING BRIEF.

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FILED

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No. 14985.  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a corporation,

*Appellee.*

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**APPELLANT'S OPENING BRIEF.**

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**Introductory Statement.**

This is an appeal by Adrian Scott from a judgment for the defendant, RKO Radio Pictures, Inc., entered by the Court, sitting without a jury after it had found "in pursuance to the case of *Twentieth Century-Fox v. Lardner*, 216 F. 2d 844" that "the discharge of plaintiff by the defendant was made justifiably and upon and for good cause". The Court also found that the right to discharge was not waived or relinquished by defendant [R. 56].

The first trial of this case was held before a jury which found by a special verdict that appellant Scott did not by his conduct individually or in concert and agreement with others at and in connection with a hearing of the House Committee on Un-American Activities in October, 1947, violate any of the provisions of paragraph XVI of his employment contract [R. 37] and also returned a general verdict in his favor against the defendant [R. 38].

Following this verdict, the District Court granted defendant's motion for new trial on the ground that the verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice [R. 46].

Thereafter, the parties stipulated that the second trial be submitted to the District Court sitting without a jury "upon the record<sup>1</sup> of the trial hereinbefore had herein", subject to the right of the parties to offer additional evidence [R. 47].

### Statement of Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction of the District Court are U. S. C. Title 28, Sections 1332 and 1441.

2. The existence of the jurisdiction is shown by the following; (a) the allegation in the amended petition for removal of action to the United States District Court "that Adrian Scott, the said plaintiff, was at the time of the commencement of said suit and still is, a citizen of the State of California residing at Los Angeles in said state, and your petitioner RKO Radio Pictures, Inc., a corporation, defendant in said suit, was at the time of the commencement of said action and still is, a corporation created and existing under the laws of the State of Delaware, and was at the time of the commencement of said action and still is a citizen of said State of Delaware and not a resident or citizen of the State of California" [R. 13];

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<sup>1</sup>Wherever references are made to the record of the first trial, they will be referred to as "L. R."

(b) the allegation in the complaint that the defendant, RKO Pictures, Inc., is a corporation organized under the laws of Delaware which transacts business in the County of Los Angeles, State of California [R. 3]; (c) the prayer of the complaint that "wherefore plaintiff prays judgment against the defendants in the sum of \$1,314,200.00" [R. 11, 12].

3. The statutory provisions believed to sustain the jurisdiction of the Court of Appeals are U. S. C. Title 28, Sections 1291 and 1294.

### Statement of the Case.

#### 1. The Pleadings and Issues.

1. In his complaint the plaintiff-appellant, Adrian Scott, alleged that the defendant-appellee, RKO Radio Pictures, Inc., a corporation, was engaged in the production of motion pictures for distribution and exhibition throughout the world; that plaintiff had acquired a national reputation for excellence of work in the motion picture industry and had won high public esteem throughout the world as an artist in the motion picture industry; that by written contract dated February 10, 1947, defendant employed plaintiff as a motion picture producer and director [R. 4].

The plaintiff alleged that he was discharged by defendants and that the defendants would not perform said contract [R. 7]. Among the other obligations of the plaintiff under the contract was the following [L. R. 116-117]:

"XVI. At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the Producer will conduct himself with due regard to the public conventions and

morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the Corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally."

The prayer was for damages in the sum of \$91,000.00<sup>2</sup> [R. 7].

2. The answer admitted the execution of the contract, but alleged that on November 26, 1947 plaintiff was in default under said contract and by reason of such default defendant discharged plaintiff from his employment thereunder [R. 18].

Defendant further alleged plaintiff had violated the morals clause (Par. XVI) of his contract and rendered himself unable to perform service contemplated and required by said contract.

Defendant prayed that plaintiff take nothing by reason of his complaint [R. 19-20].

In a supplemental answer defendant alleged that plaintiff had been in default under the contract in that, on October 30, 1947, before a committee of the House of Representatives he had wilfully and knowingly refused to answer questions propounded to him by said committee, thereby committing a crime, to wit: violation of Section 192 of Title 2 of the United States Code; and morals; that

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<sup>2</sup>The prayer is for damages in the sum of \$1,314,200.00 but the striking of portions of the complaint had the effect of limiting the possible recovery to the damages above indicated.



plaintiff was convicted and sentenced to a term of imprisonment for one year which term plaintiff served.

The parties entered into a pre-trial stipulation [R. 21-33] which stated the text of the notice of discharge given plaintiff on November 26, 1947 [R. 23-25] and it was stipulated that on October 29, 1947 plaintiff appeared before the House Un-American Activities Committee and gave the testimony as reported in the hearings published by the United States Government Printing Office [L. R. 330-335] and Scott's offered statement [L. R. 382-386].

## 2. Plaintiff's Case.

At the first trial before a jury (the record of which was stipulated to be the record of the second trial before the Court sitting without jury), the first witness was the plaintiff-appellant Adrian Scott [L. R. 235]. He testified that in February, 1947 when his contract went into effect, Dore Schary was his immediate superior and was the one who gave him orders in connection with his work. Mr. Schary was Vice President of RKO Radio Pictures in charge of picture production [L. R. 236].

It was stipulated that Mr. Scott was qualified to perform his services as a writer and producer. On cross-examination, Mr. Scott said that he was subpoenaed to appear before the Committee on Un-American Activities hearings which began on October 20, 1947 [L. R. 237] and that the people who were subpoenaed with him were known as the nineteen unfriendly witnesses and that ten of them testified before the Committee [L. R. 240]. Mr. Scott stated that the witnesses had various meetings before going to Washington [L. R. 240]. He and Edward Dmytryk, another one of the witnesses, at first retained

Mr. Bartley Crum as their attorney and Mr. Crum afterwards associated other counsel [L. R. 241]. The nineteen pooled their resources for the purpose of employing counsel [L. R. 245].

Mr. Scott knew that a meeting had occurred at the Shoreham Hotel in Washington between his counsel and Mr. Eric Johnston of the Motion Picture Producers Association and that he had received a report on the meeting [L. R. 241]. Relative to defendant's Exhibit A, an advertisement published prior to the Committee hearings and entitled "An Open Letter to the Motion Picture Industry", Mr. Scott stated that it was signed by the nineteen men [L. R. 248]. Exhibit A is set forth at L. R. 249-253. Mr. Scott said he did and does approve of that statement [L. R. 254].

It was stipulated that Mr. Scott was one of a number of persons upon whose behalf a motion to quash was filed in the form of a telegraphic notice to the Chairman of the Committee [L. R. 256] and this notice was introduced by defendants' as Exhibit B [L. R. 258-259].

Mr. Scott said that he knew that each of the ten who had preceded him on the witness stand had refused to answer questions as to membership in the Communist Party and for such refusal had later been cited for contempt; that each of them had given statements to the press [L. R. 260-261]. Defendants' Exhibit C consisting of the testimony before the Committee of all ten men was received and read to the jury [L. R. 270-348]. Mr. Scott's testimony is to be found at L. R. 330 to 335. Exhibit D, the press release statements of all of the ten men, was next received in evidence at L. R. 351-392. [Mr. Scott's statement is to be found at L. R. 382-386. It was read to the jury at R. 92-97.]

The parties then stipulated that Mr. Paul McNutt had been specially employed to represent the Motion Pictures Producers Association in the Washington hearings [L. R. 393].

Public statements by Mr. McNutt, plaintiff's Exhibits 2 and 3, were received in evidence at L. R. 467-471. Plaintiff's Exhibit 2, Mr. McNutt said on October 22, 1947 that as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employees with the idea of denying employment to them. Such action, he asserted, was without warrant of law and was not in accord with an announced policy of Congress or rulings of the Supreme Court, and therefore, would involve the producers in serious legal difficulties. Hollywood films, he declared spoke for themselves and the American public was capable of judging them.

### 3. Defendants' Case.

Edward Dmytryk, defendant's first witness said he did not know which one of the nineteen actually prepared the "open letter" [Ex. A, L. R. 404] but that the practice of the group was to ask two or three of the writers to prepare material and then to discuss it before it was issued [L. R. 407].

Mr. Dmytryk said that the first meeting of the group was at Edward G. Robinson's house [L. R. 409] and the second meeting was at Louis Milestone's [L. R. 410]. Mr. Dmytryk was asked what attitude would be taken by the nineteen men when asked on the witness stand about Communist Party membership, and replied:

"No one attitude or procedure was, to the best of my recollection, recommended over any other. I would say that the discussion was purely general" [L. R. 413].

"But we certainly never had any complete group discussion in which we definitely decided on an attitude for anyone of us or for the whole group of us before the Committee itself on the stand" [L. R. 419].

Mr. Dmytryk closed his direct testimony with the following statement:

"I just wanted to explain that the thing that brought this group of nineteen together was that they all thought that the Committee on Un-American Activities, as constituted at that time, was a bad committee, and that it should be fought; and as to how it should be fought we acted on our attorney's advice individually, \* \* \* to the best of my knowledge at the time, and it was discussed by various groups, as I say, at one time or another, many times. The advice was that the best way to fight the committee was to somehow or other to get it into court, and the way to get it into court was in a way to defy it" [L. R. 422].

On cross-examination Mr. Dmytryk said that Senator Claude Pepper of Florida was present at the first meeting at the home of Edward G. Robinson. At that time Senator Pepper said that the Committee was held in no regard in Washington and by many people in this country [L. R. 423].

Talking motion pictures taken of all ten men while testifying before the Committee were then exhibited to the jury [L. R. 429] and received into evidence as Exhibit E [L. R. 431].

Eric Johnston, president of the Motion Picture Association of America, was then called to the stand [L. R. 432].

The court ruled that Mr. Johnston could testify as an expert to give his opinion on the reaction of the public to the conduct of the plaintiffs and the other eight men who testified [L. R. 434]. His conclusion was: "The public reaction, in my opinion, was unfavorable" [L. R. 450].

Mr. Johnston testified at length concerning his own observation of the public's attitude [L. R. 451-452], stating in part:

"Because these men had been subpoenaed before a Congressional Committee and were asked whether they were or were not or ever had been members of the Communist Party, which they refused to answer, public opinion, in my opinion, was that they were members of the Communist Party, and that the industry was shielding and sheltering members who were members of the Communist Party, with all of the disrepute which that would bring to a great industry, which is extremely sensitive to public opinion" [R. 455].

On cross-examination, the witness admitted having made the following statement on November 19, 1947, at the Film Oldtimers dinner:

"They may have had a right to challenge the committee as they did. I don't know. I am not prejudging. This is something to be tested in the courts. We need a determination on that score in the traditional American way and after that there can be no argument about" [L. R. 457; Ex. 10, p. 504].

Mr. Johnston also acknowledged his authorship of the full page advertisement, "The Citizen Before Congress" [Pltf. Ex. 5; L. R. 461], published October 27, 1947.

Mr. Johnston said that nothing had ever been brought to his attention subversive or un-American which had been produced by Mr. Scott [L. R. 466].

In making up his opinion as to public reaction, the witness said that he had considered Mr. McNutt's statement of October 22, 1947 [Pltf. Ex. 2; L. R. 467] in which Mr. McNutt had said that "as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employees with the idea of denying employment to them" because such action "was without warrant of law and would involve the producers in serious illegal difficulties" [L. R. 468].

Mr. Johnston said he had also taken into consideration an article written by Mrs. Eleanor Roosevelt, published in the Washington News on October 29, 1947, which was received as Plaintiffs' Exhibit 6 [L. R. 474], and contained the following language:

"The picture of six officers ejecting a writer from the witness stand because he refused to say whether he was a Communist or not is pretty funny; and I think before long we are all going to see how hysterical and foolish we have become. \* \* \* I have never liked the idea of an Un-American Activities Committee. I have always thought a strong democracy should stand by its fundamental beliefs and that a U. S. citizen should be considered innocent until he is proved guilty. \* \* \* The Un-American Activities Committee seems to me to be better for a police state than for the U. S. A." [L. R. 474-476].

Mr. Johnston said that his own organization had compiled editorials relating to the Washington hearings [Pltf. Ex. 8]. The witness said that it represented a fair cross-section of newspaper opinions [L. R. 478].

Mr. Johnston said that George Gallup's Audience Research, Inc., is one of the services used to inform people in the entertainment field and that he took its report "Congressional Investigation of Communism in Hollywood—What the Public Thinks" into consideration in arriving at his opinion [L. R. 485]. This document was introduced as Plaintiffs' Exhibit 9 [L. R. 486], and it contained the following:

"Surveys, made since the hearings terminated disclose that no increase occurred in the proportion thinking there are many Communists in Hollywood. It remains at 10%" [L. R. 488].

"From the Standpoint of Box Office.

"1. Findings from these studies indicate that the congressional investigation—at least that part of it which is now completed—will have little immediate effect on the box office.

"The percentage of the public who thinks there are many Communists in Hollywood is not large. Only three per cent think the leaders in the industry favor Communism. The evidence points to the fact that the public has little awareness of possible Communist influences, if any, in pictures being produced today. Also, few could name any particular player whom they thought of as a Communist or Communist sympathizer" [L. R. 491].

Mr. Johnston testified that there was a House Un-American Activities Committee meeting in executive session, held in Hollywood in June, 1947 [L. R. 493]. Following this meeting, Mr. Johnston said he had proposed a three-point program to the Producers' Association. The second point of this program provided for an agreement not to employ proven Communists in Hollywood

jobs where they would be in a position to influence the screen [L. R. 496]. The Association of Motion Picture Producers did not adopt the second point. Mr. Johnston had testified before the Committee: "They did not adopt that for several, and what they thought were very good, reasons" [L. R. 499]. These reasons were stated by him to be as follows:

"The first reason assigned was that for us to join together to refuse to hire someone or some people would be a potential conspiracy, and our legal counsel advised against it.

"Secondly, who was going to prove whether a man was a Communist or not? Was it going to be by due process of law in the traditional American manner, or was it to be arrogated to some committee in Hollywood to say he was a Communist, or some producer, and if they said he was a Communist they might at some future time find he was a Republican, a Democrat, or a Socialist, and not hire him. In other words, who is going to prove that this man was a Communist? And under what method?"

"Third, that it was the duty of Congress to determine two things: first, was a Communist an agent of a foreign government?—as I believe he is—and/or, second, is he attempting to overthrow our government by unconstitutional means? Therefore, it was up to Congress to make these two determinations before we could take action.

"I must confess, they convinced me they were right on all three points, Mr. Chairman, and that is the reason they did not adopt No. 2."

At this point, counsel for defendant was permitted to read to the jury other excerpts from Mr. Johnston's testimony before the House Committee in October, 1947: [L. R. 517-522].



On further cross-examination, Mr. Johnston recalled making a speech December 5, 1947, at the Golden Slipper Square Club in Philadelphia in accepting an award for the making of "Crossfire" (a picture produced by Mr. Scott).

Mr. Walker, attorney for the defendants, then said:

"We have no intention of trying to prove by evidence in this case that any pictures were more or less successful by reason of the conduct of these 10 men. We do claim, as I tried to say in my opening statement, that the motion picture industry and the particular employers involved here were prejudiced by the conduct of these men, but we intend to introduce no evidence to show or attempt to show that they were injured moneywise by the conduct of those 10 men—that is, by a direct falling off in boxoffice receipts" [L. R. 528].

Cross-examination was resumed and the witness said that he took into consideration the radio broadcasts of October 26 and November 2, 1947 [L. R. 529], and in particular he remembered the remarks on those broadcasts made by Senator Thomas of Utah, and Senator Kilgore of West Virginia. These were introduced as Plaintiffs' Exhibit 11, and contained the following language by Senator Thomas:

"I label as unholy the methods adopted by the House Un-American Activities Committee in pursuing its course of trying to establish arbitrary values of Americanism" [L. R. 531].

On redirect, Mr. Johnston identified Exhibit "F" as a collection of photostated editorials [L. R. 540], which had been forwarded from his office [L. R. 536].

Portions of the deposition of N. Peter Rathvon, president of RKO, were then read to the jury [L. R. 563]. Mr. Rathvon told of a conversation with Mr. Scott after he returned from Washington in which he asked him to make a declaration of his political beliefs in order to correct a trend of public opinion. Mr. Rathvon said that he based his own view of the state of public opinion upon newspaper reading, Legion Post resolutions, and on material furnished him by the Motion Picture Producers Association [L. R. 564-567].

In the deposition Mr. Rathvon told of the alertness of his organization to changes in public opinion and the increasing tempo of unfavorable reaction in the Hearst papers [L. R. 571-590].

He said that the first meeting of the executive committee of RKO which considered the matter was around November 13 or 14, 1947 [L. R. 581].

Certified copies of the minutes of the RKO executive committee meeting of November 12th, 13th and 22nd were received in evidence. [L. R. 847].

Portions of the proceedings in the House of Representatives on November 24, 1947, were read to the jury, including a resolution certifying appellee to the District Attorney for contempt [L. R. 593], and the fact that it was adopted by a vote of 346 to 17 [L. R. 594].

A number of depositions of witnesses in various parts of the country (taken upon written interrogatories) and pertaining to public reaction were then offered in evidence by the defense as Exhibit "J" for identification, but the Court refused to admit them [L. R. 599], stating that the jury could be given an instruction that judicial notice could be taken of the unfavorable public reaction to Com-

munism. This instruction was ultimately given [L. R. 1101-1102; Deft. Instruction 15, L. R. 180].

The defendants then rested, subject to offering a collection of newspaper items [L. R. 599].

#### 4. Plaintiff's Rebuttal.

Excerpts from Exhibit 8, the Producers' Association compilation of editorials, were read to the jury, including the Los Angeles Times, October 28, 1947, which said:

"So far as the law is concerned, a Communist is simply a member of a political party, as a Democrat is, or a Republican. The feeling prevails that a private citizen has a right to entertain his political beliefs in private and this right is supported by the secrecy of the ballot" [L. R. 617].

Robert W. Kenny was then called as a witness for plaintiff [L. R. 625]. He testified that his office had subscribed to newspaper clippings on the hearings and had compiled them in Exhibit 13 [L. R. 973].

The witness related a meeting he and co-counsel had with Eric Johnston, Paul McNutt, and Maurice Benjamin, counsel for the producers, in Washington on October 19, 1947 [L. R. 627].

A copy of Exhibit "B", the motion to quash the subpoenas, was handed to Governor McNutt on this occasion and the contents of it were discussed [L. R. 628]. Additional copies of an accompanying memorandum of law [Ex. 21; L. R. 975-989] were sent up to the McNutt suite after the interview [L. R. 630].

Mr. Kenny said he said on that occasion that inasmuch as he and his associates were representing their employees he thought that they should know, as attorneys for the

employers, the moves that were going to be made and they discussed the motion to quash and the law. He said Mr. Benjamin said that some of the questions would only be settled by the Supreme Court [L. R. 631].

The witness stated Mr. McNutt said we are going to "make the same fight that Wendell Willkie made for the motion picture industry before the Nye Committee" [L. R. 631]. The meeting lasted an hour [L. R. 631].

Mr. Kenny said Eric Johnston told them that as long as he was president of the Producers Association there would be no blacklist [L. R. 632]; and that Bartley Crum said:

"Eric, I knew that was true. I knew that you, Eric Johnston, would never support anything as un-American as a blacklist" [L. R. 632].

Upon cross-examination, the witness said that at the time of the Shoreham meeting he did not have any definite idea as to what the attitude of his clients would be if asked about Communist Party membership. This was because he had not been consulting with the individual clients [L. R. 636].

The witness said that he had told the group at the Shoreham meeting that if the motion to quash was denied the men would answer all pertinent questions of the Committee, but there was no discussion as to whether Communist Party membership would be pertinent [L. R. 637].

After the meeting at Mr. McNutt's apartments, the witness and the other lawyers reported to all of the 19 men what had happened [L. R. 641].

The Court then made the following statement to the jury:

"Ladies and gentlemen, in order to save time, counsel have stipulated that the writings and the products

of the writings of the plaintiffs in this case continued to be exhibited throughout the United States, and that such exhibition of such pictures gave the plaintiffs their screen writer credit in pursuance to the terms of the contract, and the circulation was continued.” [L. R. 643].

Dore Schary was next called by the plaintiff under Section 43(b) F. R. C. P. [L. R. 687]. During the year 1947 he was the executive vice president in charge of production at RKO and Adrian Scott was a producer working under his supervision and direction. In the year 1947, under his direction Mr. Scott worked on a picture entitled “Crossfire” and he did preparatory work on the pictures “The Boy With the Green Hair” and “The Great Man’s Whiskers.”

He was familiar with the fact that Mr. Scott had also worked for RKO on the pictures “Murder, My Sweet” and “Mr. Lucky.” He never found anything in Mr. Scott’s work for the motion picture screen which he would consider by any standards subversive or un-American. His work was very good and he was thoroughly satisfied with it [L. R. 688-689]. RKO worked with Audience Research, Inc., to determine the popularity of various people in the industry [L. R. 690].

Mr. Schary knew four or five weeks prior to the commencement of the un-American Activities Committee hearings in Washington between October 20 and 30, 1947, that Mr. Scott had been subpoenaed. Mr. Schary had also been subpoenaed himself [L. R. 691].

Before the openings of the hearings in Washington he recalled a discussion in which he stated to Adrian Scott that his job was safe and that the studio could not inquire into the political ideas of employees, that the

only matter was the ability and work of the employees and not their political associations [L. R. 691]. He remembered discussion with Scott the contents of a pamphlet in which he (Schary) had participated in preparing and which was leveled mainly at the personality and record of Representative Rankin and was not a general attack on the Committee. Mr. Schary said that in his conversation with Mr. Scott before the Committee hearings, the following took place:

“We talked generally about the Committee and some of its procedures. I believe that some of its procedure was dangerous. We talked at one time about some of the individuals, particularly Mr. Rankin, whom I had objections to personally because of some of his bigoted points of view.”

Mr. Schary said that he had read to Mr. Scott the statement which he was going to read before the Committee.

“I had intentions of making a very strong statement myself.” [L. R. 695].

“I was going to make a statement attacking some of the techniques of the Committee. I changed my mind about making that statement when I was in Washington.”

Mr. Schary stated that he did not feel compelled to tell Mr. Scott that he had changed his mind about making a statement [L. R. 695]. Mr. Schary did not remember that Scott ever told him that he was going to refuse to answer any of the questions of the Committee. At L. R. 699-670 the following interrogation took place:

“Q. Now, Mr. Schary, don't you remember that the only thing you said to Mr. Scott was you wanted him to refrain from being loud and you

wanted him to refrain from being boisterous on the stand? A. That is right. \* \* \*

Q. And you know, do you not, you heard Mr. Scott's testimony didn't you in Washington? A. Yes.

Q. He wasn't loud, was he? A. No.

Q. He wasn't boisterous, was he? A. No.

Q. You made some reference to what you could remember about your conversation with Mr. Scott—don't you recall that in your conversation with Mr. Scott, you told him that you were the one who had gotten a Hollywood trade paper before the hearing, to write the first article attacking the House Committee on Un-American Activities? A. Attacking the technique of the House Committee.

Q. Did you say to him 'attacking the technique of the House Committee'? A. The procedure, I am sure I did. I am sure I did not say 'attacking the House Committee.'

Q. Well, instead of talking to him about the procedures or telling him that you had gotten a trade paper to attack the procedures or the technique of the Committee, didn't you tell him that you had a paper, this trade paper, to challenge the charges of this Committee? A. The charge of the Committee that there was Communist Party propaganda in motion pictures."

The witness said that he remembered conversations with Mr. Scott after the hearings: "I said that I personally would still take the position that I took on the stand at Washington, and that I have taken that stand as a matter of fact at the Board of Directors meeting at RKO." [L. R. 703.] \* \* \*

"Q. What was that? A. A man's employment had to be based on his ability to perform a service

rather than on any political affiliation. That was the position I had taken in Washington and that I still took at that time before the Waldorf meeting." [L. R. 704.]

"Q. Was there anything else said about what had been said by the Board of Directors and what the attitude of Mr. Rathvon was? A. That came later before I went to New York for that meeting. We tried to get both Scott and Dmytryk to sign affidavits which we thought might protect their positions with our Board of Directors, who were insisting that we get a non-Communist statement from Scott and Dmytryk." [L. R. 706.] \* \* \*

"As I remember, both Scott and Dmytryk were willing to sign an affidavit that they were not in favor of any party that would overthrow the government by force but that they would not specifically say that they were or had not been Communists. Peter Rathvon would not accept that. He said that would not be acceptable and I told that to Scott." [L. R. 707.]

At L. R. 708 Mr. Schary testified:

"I told him (Scott) I didn't think the issue of challenging the Committee's right to ask you whether you were a member of a political party had been brought in properly.

I said this, and I said it to many people, that if there was an issue at stake, I thought the witnesses should have gone on the stand very quietly, and with respect to the Committee, that they didn't think the Committee had the right to ask such a question, and then leave the stand, call a meeting with the press, tell the press whether or not they were Communists, that they were not afraid to say that, but say the reason they had not answered the



question to find out whether or not there was a constitutional challenge in the act they had taken.

Q. This conversation with Scott took place after the hearings? A. That's right, sir."

Schary testified that he had only received about forty letters following the Committee hearings. The attitude of the writers of the letters toward Scott and Dmytryk was about half and half [L. R. 710]. A good many of the letters unfavorable to Mr. Scott came from lunatic branches or crackpots [L. R. 711].

Mr. Scott was recalled by the plaintiff to testify in rebuttal [R. 73]. He said that following receipt of his subpoena he had a conversation with Mr. Dmytryk and Mr. Schary in which Mr. Schary said that he wanted to make it clear that the studio was not interested in his politics. They were only interested in his work in the pictures he produced and in his ability as a maker of motion pictures for RKO [R. 74]. Mr. Schary had said that this was Mr. Rathvon's position and that this was also the studio's position and that the industry was going to be behind him (Scott).

"Mr. Schary said that the industry was opposed to this investigation and they felt it was an attack on the screen freedom and that the industry intended to stand up and fight against this Committee. \* \* \* He said nothing about techniques or procedures to me. I recall very clearly Mr. Schary reading a typewritten statement to me in which he said he was going to read to the Committee when he appeared in Washington." [R. 75.] \* \* \*

"Mr. Schary spoke about a pamphlet which he had compiled on the subject of Representative John Rankin who was a member of the Un-American

Activities Committee. This pamphlet, which I had not seen, Mr. Schary told me dealt with Mr. Rankin's anti-Semitic and anti-Negro and anti-United Nations activities. Mr. Schary was apprehensive lest this subject would be brought up or he would be confronted with this pamphlet while he was testifying in Washington." [R. 76.]

"Mr. Schary had received a visit from two investigators of the Committee—Leckie and Smith—and Mr. Schary said that they had requested the setting up for viewing of two films that RKO Pictures had made. Mr. Schary said they wanted to see a film which he made which was called 'The Farmer's Daughter,' which was then under attack, and they also wanted to see a film which I had made called 'Crossfire'." [R. 77.]

"In substance Mr. Schary said this was an attack on progressive film-making." [R. 77.]

"Mr. Schary made one request only, and that request was that we, Mr. Dmytryk and myself, that we conduct ourselves in a mannerly fashion before the Committee and that was the only thing that he said." [R. 78.]

After the hearings were over in Washington, Mr. Scott said he had a conversation with Mr. Schary:

"Mr. Schary also said in regard to the hearings that he was very upset about the sell-out of Jack Warner, the head of Warner Brothers Studio, that he resented that, and he resented the sell-out of the industry, that he alone took the position that they had all agreed they would take in Washington. \* \* \* That they were to stand up and to fight against the Committee. He thanked me for conducting myself in a mannerly fashion before the Committee, and

he said that he personally resented being made the 'patsy' of the hearing, which was his own word.

Following his return from Washington Mr. Scott said he continued to work every day in the studio until the time he was fired." [R. 82.]

"I asked Mr. Schary about the question of jobs, jobs of everybody, because of the hearings, and he said that he thought that a blacklist would be set up, that it would be an unannounced blacklist, and that men now would be hired or not hired because of what went on in Washington, and he thought this was pretty terrible, and that he would continue to hire men because of their ability, and not because of what somebody thought of their politics." [R. 83.]

On the occasion of the discharge Mr. Scott was in Peter Rathvon's office at RKO:

"Mr. Rathvon first handed us \* \* \* a letter which stated that if we went on voluntary suspension, that if we were acquitted in the courts, and that if we signed an affidavit that we were not and never had been members of the Communist Party, that we then could resume our contracts at the point at which these facts were determined."

When they refused to sign this letter, Rathvon then gave him the letter of discharge and a man from the Accounting Department gave them their final checks [R. 85-86.]

On cross-examination Mr. Scott said that he had not told Mr. Schary at any time before he left for Washington that he would refuse to answer questions asked by the Committee.

"I didn't know at that point what my testimony would be."

He said he did not reach a decision on his testimony until he reached Washington [R. 98].

### 5. Defendants' Surrebuttal.

By stipulation, defense counsel was permitted to read to the jury Eric Johnston's version of the meeting in Paul McNutt's apartment on the evening of October 19, 1947, as given by him in the trial of *Cole v. Loew's* [L. R. 759-766].

Mr. Ring Lardner was recalled as a witness by the defendant under Rule 43(b) [L. R. 876], and testified that he attended the meeting at the home of Edward G. Robinson and 150 or more people were present [L. R. 876]. There was one meeting at the home of Mr. Milestone attended by substantially all of the unfriendly 19 witnesses at which the pooling of legal expenses and employment of counsel was discussed [L. R. 877].

On cross-examination the witness stated that the persons present at the Robinson meeting included several motion picture actors, Mr. and Mrs. Humphrey Bogart, Danny Kaye, and Mrs. Robinson, who introduced Senator Pepper [L. R. 881].

"The Witness: As I recall, Senator Pepper told us that whereas the historical role of congressional committees gave them quite extensive powers, that there was something much higher in the Constitution than that, and that, since the Congress was unable to legislate at all under the First Amendment in the field of free speech, that it was not proper for them to investigate in that field, since the only purpose of a congressional investigation was to prepare legislation.

"He felt that motion pictures clearly came under the general heading of freedom of the press, and any

such investigation into the content of motion pictures was none of Congress' business under the First Amendment, and that the politics of anybody who worked in motion pictures were similarly none of Congress' business, and that, therefore, the committee was functioning outside its proper sphere and was not conducting a legal investigation." [L. R. 883].

On redirect, Mr. Lardner said that Senator Pepper discussed the right of Congress to investigate Communism and said that

"there was a certain narrow area within which this sort of committee might function—I think he confined what he said almost entirely to the field of the motion picture. As I recall it he confined it to motion pictures and Congress' right to investigate in that area." [L. R. 884.]

Eric Johnston's testimony on October 27, 1947, before the House Committee was then read to the jury [L. R. 891-949].

Defense counsel then read to the jury editorials selected from Exhibit "L."

Following this plaintiff's counsel read other editorials from the same exhibits.

Plaintiff's Exhibit 21, the memorandum in support of motion to quash subpoenas [Ex. "B"; L. R. 975], and Exhibit 7, an article by Harold L. Ickes in New York Post, October 31, 1947, were received in evidence [L. R. 990]. Both sides then rested.

## 6. The Verdict.

At the conclusion of the first trial the jury rendered a special verdict that the plaintiff, Adrian Scott, had not by his conduct individually or in concert and agreement with others at and in connection with the hearing of the House Committee on Un-American Activities in October, 1947, violated any of the provisions of paragraph XVI of his employment contract. By a second special verdict they found that the defendant, RKO Radio Pictures, had not intentionally waived any right it might have had to discharge the plaintiff Adrian Scott from his employment. In addition the jury rendered a general verdict in favor of the plaintiff Adrian Scott against the defendant [L. R. 37-38].

Defendant's motion for a new trial was granted following said verdicts upon the two grounds that the verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice [R. 46].

## 7. The Second Trial.

The case was not retried until this Court rendered its decision in *Twentieth Century-Fox Film Corporation v. Ring Lardner, Jr.*, No. 13,491, 216 F. 2d 844 [R. 141]. Upon a stipulation of the parties [R. 47] the case was retried without a jury before the same District Judge who had heard the case originally when sitting with a jury [R. 47]. The proceedings on retrial were very brief and are to be found at R. 127-143.

Plaintiff offered the entire record and exhibits that were offered in the original trial of the action [R. 127] and then rested [R. 128]. The defendants offered Section M of the pre-trial stipulation concerning the pro-

ceedings leading up to and including the indictment and conviction of the plaintiff Adrian Scott on the charge of violating Section 192 of Title 2. of U. S. C. Plaintiff objected to the receipt in evidence of these facts on the ground the events had occurred after notice of discharge were given to the plaintiff. However, the Court admitted the items on the basis of this Court's ruling in *Twentieth Century-Fox v. Lardner*, 216 F. 2d 844, saying [R. 129-130]:

"The Court: Gentlemen, so we may understand each other thoroughly, the Court feels that it is bound by the decision of the Ninth Circuit in the Lardner case, so the only question that this Court has before it is the question of waiver. I feel that would be my limitation. I would be bound to follow the Court's holding to the effect that he (the plaintiff) had violated the contract \* \* \* as a matter of law under the Ninth Circuit's decision."

Defendants additionally offered into evidence those portions of the Rathvon deposition which were, on objection, excluded at the first trial but which were copied into the record as an offer of proof and are to be found in the record on this appeal at R. 60 to R. 73 and R. 135 to R. 136. The defendants stated that this evidence had to do with waiver [R. 134]. The defendants then rested [R. 140], and the Court then made the following statement [R. 141-142]:

"There is only one thing that I can do and that is grant the defendants judgment based upon the reasoning of— \* \* \* the Lardner case.

One reason I granted a new trial in the Scott case was because they didn't find there was a waiver and there has been nothing offered here that indi-

cates any change of evidence insofar as waiver is concerned.

Your question is whether or not a man conducting himself as Scott apparently did, under the guidance of Mr. Kenny, conducted himself before a Senatorial committee as he did and his subsequent conviction involves the question of moral turpitude. As a matter of fact his conviction was grounds for termination of the contract. Of course the contract expired before that conviction.

Mr. Kenny: Yes, that is right. And of course our point and we are not pressing it now, under the Quinn case Scott could not have been convicted because the Quinn case held that a witness is entitled to a—

The Court: I have sent a lot of men to jail who shouldn't have been imprisoned.

We are living in a time of change, not only insofar as the law is concerned, but changes in everything.

As I say, I have sent many a Jehovah Witness to jail who under the present ruling of the Supreme Court should not have been committed.

But that is a matter that has to be decided by the Supreme Court and I am controlled by the Ninth Circuit, so I am going to direct counsel for the defendants to prepare findings in accordance with the court's ruling."

Said findings of fact and conclusions of law were subsequently signed by the Court [R. 49] and a judgment in favor of the defendant was entered [R. 57]. Notice of Appeal was timely given [R. 58].



## ARGUMENT.

### Preliminary.

The critical question on this appeal is whether Scott's conduct, as a *matter of law*, constituted a breach of the morals clause of his contract. For the convenience of the court that clause is quoted below:

"16. At all times commencing on the date hereof and continuing throughout the production and distribution of the Pictures, the Producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally."

The jury, by special interrogatory, found that Scott had not violated his contract.

There was no conflict in the evidence concerning what Scott did and no conflict concerning the surrounding circumstances. It is true that press reports and the opinions of commentators varied, but none of these opinions tended to alter the actual facts.

The trial court gave judgment for respondent on the theory that this case was controlled by *Twentieth Century v. Lardner*, 216 F. 2d 844 (C. A. 9; 1954). In that decision the Court of Appeals determined as a matter of law, and contrary to the jury's verdict, that Lardner's employer "just necessarily suffered a net loss in prestige,"

and went on to hold that Lardner's conduct constituted moral turpitude "as a matter of law." 216 F. 2d 844, 851.

Appellant contends that in the present case the issue was one of *fact*, not law. Because there was no conflict in the evidence, the verdict of the jury should have been allowed to stand.

### I.

**The Jury's Determination That Scott Had Not Violated His Contract Was a Determination of Fact, and the Trial Court Had No Power to Set Aside the Verdict.**

It may be sufficient to say that the foregoing principle was recognized below when both parties submitted the question to the jury for a finding on a special interrogatory [R. 37].

An analysis of the facts and decisions substantiates the foregoing.

It has already been noted that there was no conflict in the evidence concerning what Scott did. In *Lardner*, which was tried simultaneously with this case, this court said: "There being no dispute as to what the ten men did . . ." (216 F. 2d 850, 851.)

The morals clause was concerned mainly, if not wholly, with the effect of the employee's conduct. By that clause the employee agreed:

(1) To conduct himself with due regard to the public conventions and morals.

(2) Not to do anything which would tend to degrade him in society; or

(3) Bring him into public disrepute, contempt, scorn, or ridicule; or

(4) Tend to shock, insult or offend the community or public morals or decency; or

(5) Would prejudice his employer or the motion picture industry in general.

Items 1, 2, 3 and 4 are concerned with the community's sense of propriety, public morals, and the community's sense of right conduct. No statute, decree, executive order, or other source of law dictates any of the foregoing; on the contrary, they draw peculiarly from an inchoate community feeling, not susceptible to legislative definition or judicial decree.

It is equally true that the question of prejudice to an employer is a question of fact. No question of law was presented when a jury, having all of the evidence, concluded that Scott's employer was not prejudiced.

#### **A. Differences Between Lardner's Contract and Scott's Contract.**

A principal item in Lardner's contract was a provision that the employee's *commission of an offense involving moral turpitude* committed a breach; the *Lardner* opinion dealt at length with this phrase in concluding that Lardner's conduct constituted moral turpitude as a matter of law. The Scott contract does not refer to an *offense* or to *moral turpitude*.

It is true that public morals and moral turpitude are related items, one depending upon the other, the two differing primarily in degree.

In *In re Hatch*, 10 Cal. 2d 147 (1937), it was said, at page 151:

"The concept of moral turpitude depends upon the state of public morals, and may vary according

to the community or the times. (*In re Bartos*, 13 F. 2d 138.) In *Beck v. Stitzel*, 21 Pac. 522, 524, citing among other cases, *In re Coffey* [123 Cal. 522], it was said: 'This element of moral turpitude is necessarily adaptive; for it is defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community.' "

In *In re Bartos*, 13 F. 2d 138 (Neb., 1926), it was said at page 139:

"The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times. (Citations.)"

The distinction which is relevant to the present appeal is that while the determination of whether certain conduct constitutes an "offense involving moral turpitude" has in some cases been thought to present a question of law, this is not true, so far as we have been able to discover, of questions involving public morals and decency.

The decision is *State v. Malusky*, 59 No. Dak. 501, 230 N. W. 735, 71 A. L. R. 190 (1930), contains an illuminating discussion on the subject of *public morals* at page 193:

"Some standards must exist according to which the determination as to whether act or conduct is moral or immoral is to be made. That standard is public sentiment—the expression of the public conscience. It may be manifest, unwritten, and more or less nebulous, as legend, as tradition, as opinion, as custom, and finally crystallized, written as the law. Thus the standard is fixed by the consensus of opinion, the judgment of the majority. When the

majority is slight, there is, of course, greater opposition to the part of the minority to the standard. The majority may become the minority and the standard change. But, so long as it is established, measurement must be made according to its terms."

In decisions dealing with related problems, such as proof of good moral character and questions of obscenity, it is uniformly held that such questions are questions of fact. The essence of the problem is the consistency or lack of consistency of given conduct with the community's sense of morality and propriety. It is not fitting that a judge or a court should impose his personal standards as the touchstone for determining such questions.

#### B. A Question of Fact.

The following is from the opinion in *Johnson v. U. S.*, 186 F. 2d 588 at 589-590 (C. A. 2, 1951), a case involving an alien naturalization.

" . . . We must own that the statute imposes upon courts a task impossible of assured execution; people differ as much about moral conduct as they do about beauty. There is not the slightest doubt that to many thousands of our citizens nothing will excuse any sexual irregularity, for some indeed this extends even to the subsequent marriage of an innocent divorced spouse. On the other hand there are many thousands who look with a complaisant eye upon putting an easy end to one union and taking on another. Our duty in such cases, as we understand it, is to divine what the 'common conscience' prevalent at the time demands; and it is impossible in practice to ascertain what in a given instance it does demand. We should have no warrant for assuming that it

meant the judgment on some ethical elite, even if any criterion were available to select them. Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far the distinguishing features of each case would be morally relevant to one person and not to another. Theoretically, perhaps we might take as the test whether those who would approve the specific conduct would outnumber those who would disapprove; but it would be fantastically absurd to try to apply it. So it seems to us that we are confined to the best guess we can make of how such a poll would result."

In *United States v. Francioso*, 164 F. 2d 163 (C. A. 2, 1947), the court said:

"In *United States ex rel. Iorio v. Day* (2 Cir., 34 F. 2d 920, 921), in speaking of crimes involving 'moral turpitude' we held that the standard was, not what we personally might set, but 'the commonly accepted mores': *i. e.*, the generally accepted moral conventions current at the time, so far as we could ascertain them. The majority opinion in *United States ex rel. Berlandi v. Reimer* (2 Cir., 113 F. 2d 429) perhaps looked a little askance at that decision; but it did not overrule it, and we think that the same test applies to the statutory standard of 'good moral character' in the naturalization statute. Would the moral feelings, now prevalent generally in this country, be outraged because *Francioso* continued to live with his wife and four children between 1938 and 1943? . . ."

Similarly see *United States v. Reimer*, 113 F. 2d 429 (C. A. 2, 1940); *United States v. Day*, 34 F. 2d 920 (C. A. 2, 1929); *In re Matura*, 87 Fed. Supp. 429 (S. D. N. Y., 1949).

In *Knoles v. U. S.*, 170 Fed. 409 (C. A. 8, 1909), it was held that a court cannot in an obscenity prosecution, declare a writing to be obscene as a matter of law. See also *Magon v. U. S.*, 248 Fed. 201 (C. A. 9, 1918); *United States v. Kennerly*, 209 Fed. 119 (S. D. N. Y., 1913). In the last cited case it was said:

“ . . . If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.

\* \* \* \* \*

“Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of *general notions about what is decent*. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech” (p. 121).

To the same effect is *United States v. Levine*, 83 F. 2d 156 (C. A. 2, 1936).

It is submitted that the trial court therefore was in error in concluding that the decision in the *Lardner* case on a question of law was binding on it in making a finding of fact.

**C. Scott's Conduct Was Not a Violation of His Morals Clause.**

During the past few years, and since this Court's ruling in the *Lardner* case, decisions of the Supreme Court of the United States in the area of Congressional inquiry have tended to clear the atmosphere.

Mr. Scott's conduct would not today be thought to constitute an offense. He was not at any time specifically directed to answer the questions propounded to him [R. 331-335]; and the Supreme Court has held that such a specific direction is a prerequisite to a conviction for contempt. (*Quinn v. U. S.*, 349 U. S. 155 (1955); *Fagenbaugh v. U. S.*, 232 F. 2d 803 (C. A. 9, 1956).)

Furthermore, the Supreme Court has recently held that no implication whatever may be drawn from the failure of a witness to answer in a Congressional inquiry. In *Slochower v. Board of Ed.*, 100 L. Ed. (Adv. p. 449) the court on April 9, 1956, said at page 454:

"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown v. Walker*, 161 U. S. 591, 610, 40 L. Ed. 819, 825, 16 S. Ct. 644. We have reaffirmed our faith in this principle recently in *Quinn v. United States*,



349 U. S. 155, 99 L. Ed. 964, 75 S. Ct. 668. In *Ullman v. United States*, ..... U. S. ...., 100 L. Ed. (Advance p. 361), 76 S. Ct. ...., decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullman*, a witness may have a reasonable fear of prosecution yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, *The Fifth Amendment Today* (1955).”

In view of the foregoing language, no United States court would today draw any incriminating conclusions from Scott’s failure to answer.

It should be noted that Slochower relied on the Fifth Amendment, which in terms deals with incrimination; Scott, on the contrary, relied on the First Amendment.<sup>3</sup>

Clearly no sinister motive or contemptuous attitude can be imputed to a reliance on the First Amendment, or to an attempt to determine, by judicial means, the power of Congress to conduct such an inquiry.

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<sup>3</sup>“Mr. Scott: I do not believe it is proper for this Committee to inquire into my personal relationships, my private relationships, my public relationships.” [L. R. 332; Deft. Ex. B, particularly at par. FOURTH; L. R. 259.]

## II.

### The Order Granting a New Trial Was Based Upon an Error of Law and Should Be Reversed.

While an order granting a new trial is not an appealable order, it is of course reviewable on appeal from a final judgment. (*Marshall's U. S. Auto v. Cashman*, 111 F. 2d 140 (C. A. 10, 1940); *Kanatser v. Chrysler Corp.*, 195 F. 2d 104 (C. A. 10, 1952).)

The function of the trial court on a motion for new trial, even in the case of conflicting evidence, does not include the substitution of the court's determination of what is reasonable, or of what is proper. A good discussion and review of pertinent authorities appears in *Moore v. Rose-Cliff Realty Corp.*, 88 Fed. Supp. 956 (D. N. J., 1950), in which it was said:

"The courts 'are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'"

\* \* \* \* \*

[The court then quotes from *Tennant v. Peoria etc. Ry. Co.*, 321 U. S. at p. 35, as follows]:

"The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.'"

Going on, it was said:

“It was held by the Supreme Court in the case of *Lavender v. Kurn*, *supra*, 327 U. S. at page 652, 66 S. Ct. at page 744, that ‘it would be an undue invasion of the jury’s historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury.’ It necessarily follows that it would likewise be an undue invasion of the jury’s historic function for the trial court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury.”

The foregoing language is particularly appropriate in the present case, in which there was no conflict as to the facts and the question for the jury was whether Scott’s conduct violated any public standards of morals or decency.

While it is of course true that the Court of Appeals will generally not reverse a trial court’s order on a motion for new trial, it is also true that “in the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in any similar situations . . .” (*Charles v. Norfolk & Western Ry. Co.*, 188 Fed. 691, at 692 (C. A. 7, 1951), citing *Kottekos v. U. S.*, 328 U. S. 750.) A reviewing court should not hesitate to set aside an order on motion for a new trial where the trial court erred on a question of law.

“It is ordinarily said that the granting of a new trial is within the sound discretion of the trial court, and it is sometimes loosely said that the action of the court in this respect is not reviewable. It is

true also that appellate courts will not ordinarily review the action of a trial court in refusing a motion for a new trial on questions of fact. . . . And when the question on which the motion for a new trial is based is a question of law, the action of the trial court is undoubtedly subject to review."

*Prichard v. Nelson*, 55 Fed. Supp. 506, 516 (W. D. Va., 1942).

It is also true that a court's order on motion for new trial will be reviewed where it appears the order was based on an erroneous reason or mistake. (*Sommerville v. Capital Transit Co.*, 192 F. 2d 413 (C. A. D. C., 1951); *Natl. Beneficial Life v. Shaw-Walker Co.*, 111 F. 2d 497 (C. A. D. C., 1940); cf. *Southern Pacific Co. v. Guthrie*, 186 F. 2d 926 at p. 932 (C. A. 9., 1951).)

It is submitted that the trial court's order granting a new trial and setting aside the jury's verdict was based on error in law; the order should be set aside, and the judgment in favor of plaintiff should be reinstated.

### III.

#### The Trial Court's "Finding" That Scott Had Violated His Contract Was Not a Finding of Fact, and in Any Event Is Erroneous.

The record discloses that the trial court did not purport to exercise any independent determination in the finding which states that the plaintiff violated the morals clause of his contract. When the case was on retrial, on the record made in the previous trial, Judge Harrison said:

"The Court: Gentlemen, so we may understand each other thoroughly, the Court feels that it is bound by the decision of the Ninth Circuit in the Lardner case, so the only question that this Court

has before it is the question of waiver. I feel that would be my limitation. I would be bound to follow the Court's holding to the effect that he had violated the contract.

Mr. Kenny: As a matter of law?

The Court: As a matter of law under the Ninth Circuit's decision."

This explicit statement is reflected in the language of Finding XI [R. 54-55], which states:

"In pursuance to the case of 20th Century Fox v. Lardner, 216 F. 2d 844, the Court finds that: etc."

It is apparent that the trial court felt itself bound by the opinion rendered in *Lardner*, and made it plain that the trial court was not attempting to reach an independent conclusion on the record.

While it is true the facts were not disputed, it is also true that the standards imposed by the Scott contract were different from those imposed by the Lardner contract. This point is discussed more fully under the heading "Differences Between Lardner Contract and Scott Contract." (I, A, this brief.)

What has been said heretofore on the point that the question of breach was a question of fact, not of law, is pertinent here. It was, of course, the duty of the trial court, in making a finding of fact, to exercise an independent determination on the record; and in making a finding of fact, a trial court is not bound by a determination made in another case as a matter of law.

In any event, as has been argued under Point I hereof, the determination that Scott had violated his contract was erroneous.

The argument which underlies appellant's contention under the present heading is that the jury properly determined the facts, and there was no basis in law for setting the original verdict aside.

### Conclusion.

The judgment should be reversed and the trial court directed to enter judgment in accordance with the verdict of the jury.

Respectfully submitted,

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No. 14985

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a Corporation,

*Appellee.*

---

## APPELLEE'S BRIEF.

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**FILED**

**AUG 31 1956**

**PAUL P. O'BRIEN, CLERK**





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No. 14985  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a Corporation,

*Appellee.*

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**APPELLEE'S BRIEF.**

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**Introductory Statement.**

This case and the case of *Ring Lardner v. Twentieth Century-Fox Film Corporation*, herein sometimes referred to as the "*Lardner Case*" were tried together in the first instance and in each case the jury brought in a general verdict in favor of the plaintiff. In the *Lardner Case* there were special verdicts to the effect that Lardner had not breached his employment contract and that Twentieth Century-Fox had waived the breach if there was one. In the *Scott Case* there were special verdicts to the effect that Scott had not breached his contract of employment and that RKO had not waived the breach if there was one. A motion for a new trial was denied in the *Lardner Case* and granted in the *Scott Case* on the ground that the general verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice.

After the decision of this court reversing the judgment in the *Lardner* Case (216 F. 2d 844), the instant case, by stipulation of the parties, was tried before the District Court without a jury, upon the record in the first trial and some additional evidence then introduced.<sup>1</sup> Upon findings and conclusions duly made judgment was entered in favor of defendant, and from that judgment this appeal was taken.

The circumstances out of which this action arose are in brief as follows:

Defendant was and is a producer or manufacturer of motion pictures. It has in its organization individual company producers who take charge of the production of particular pictures, and it was as such that it employed plaintiff under a written contract. Among other things, this contract provided that Scott

“will conduct himself with due regard to public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn, or ridicule, or that will tend to shock, insult, or offend the community or public morals or decency, or prejudice the Corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement or which will injure him physically or mentally.”

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<sup>1</sup>Except in a few instances where the evidence relates peculiarly to Scott, the evidence is identical with that in the *Lardner* Case. With the exception of Volume I (pp. 1 to 149) the Transcript of Record on Appeal in the instant case is identical with the Transcript of Record in the *Lardner* Case, references to which latter will be designated “L. R.”.



Between October 20th and October 30, 1947, the Committee on Un-American Activities of the House of Representatives conducted a public hearing as part of its investigation of alleged Communist infiltration of the motion picture industry. Plaintiff and nine other men with whom he had agreed as to his and their course of conduct before the Committee, were called as witnesses and, upon being questioned, each of them refused to disclose whether he was or had been a member of the Communist Party. For such refusal, plaintiff was cited and indicted for contempt of the Congress of the United States and in due course convicted.

The Committee hearing, and the conduct of plaintiff and his associates thereat, received intensive nationwide publicity by radio, news reels, news reports, editorial comment, and all other media of news distribution. It was and is the defendant's contention that the conduct of plaintiff and his associates at and in connection with the hearing created a widespread belief that plaintiff and his colleagues were Communists and that they held in contempt the Congress of the United States and the fundamental institutions of this country. It was and is the defendant's contention that the conduct of plaintiff and his associates created a widespread belief that the motion picture industry generally, and the defendant in particular, employed and harbored Communists and had a sympathetic and indulgent attitude towards Communism.

It was and is defendant's contention that plaintiff's conduct constituted a violation of public conventions and morals, that it tended to degrade him in society and to bring him into public disrepute, contempt, scorn, and ridicule, that it tended to shock, insult and offend the community and public morals and decency and to prejudice

defendant and the motion picture industry in general, and that it tended to lessen his capacity fully to comply with his employment contract. It was and is defendant's contention that plaintiff's conduct violated the express obligations of his contract and, as well, the legally implied covenant that plaintiff would conduct himself with such decency and propriety as not to injure his employer in his business.

The verdict of the jury at the first trial was to the effect that plaintiff had not violated his contract obligations. It is defendant's contention that the trial court properly granted a new trial because such verdict was contrary to the great weight of the evidence and because to have permitted such verdict to stand would have been a miscarriage of justice. It is the contention of defendant that upon the second trial without a jury, the District Court properly determined that plaintiff had violated his contract obligations and correctly rendered judgment for defendant.<sup>2</sup>

## STATEMENT OF THE CASE.

### A. The Pleadings and Issues.

Plaintiff's analysis of the pleadings and issues should be supplemented in the interest of completeness by the following:

Defendant's First Affirmative Answer alleges that at and prior to November 26, 1947, plaintiff was in default, and ever since has continued in default, under his contract

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<sup>2</sup>As noted in the decision by this court in the *Lardner* Case, the *Lardner* Case and *Loew's v. Lester Cole*, 185 F. 2d 641 (sometimes referred to as the "*Cole* Case"), are similar in origin and substance. This is equally true as regards the *Cole* Case and the case at bar.

because of his failure to obey reasonable instructions and directions given him by defendant.

Defendant's Supplemental Answer specifically alleged (R. 35) that plaintiff's conduct was contrary to and without due regard for public conventions and morals.

Defendant's Supplemental Answer specifically alleged (R. 35):

That among the issues presented and determined in the criminal proceeding in which plaintiff was convicted were the following:

1. The questions asked of plaintiff by the Committee on Un-American Activities were pertinent.
2. Plaintiff wilfully and knowingly refused to answer said questions.
3. Plaintiff had committed the crime of violating Section 192 of Title 2 of the U. S. Code.

That plaintiff was estopped and precluded from denying or contesting herein any of the facts so adjudicated and determined to be true.

Defendant's Supplemental Answer alleged in effect that plaintiff was in default because at all times prior to October 30, 1947, plaintiff concealed from defendant and the public that he was a Communist, that on October 30, 1947, and prior thereto he was a Communist, that on October 30, 1947, plaintiff, as a result of his conduct during his appearance before the Committee, revealed his membership, and as a consequence, the defendant and the motion picture industry were prejudiced and subjected to public scorn and contempt.

## B. The Facts.<sup>3</sup>

### 1. The Congressional Investigation and Plaintiff's Conduct in Connection Therewith.

In 1947 and for some time prior thereto considerable public attention had been directed to claims that a number of Communists had infiltrated into responsible, creative positions in the motion picture industry and were thus enabled to use and were in fact using their influence to disseminate pro-Communist and Un-American propaganda through the medium of the screen. Accordingly the Committee on Un-American Activities of the House of Representatives,<sup>4</sup> pursuant to its statutory authorization

“to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principles of the form of government as guaranteed by our Constitution . . .”

(Legislative Reorganization Act of 1946, Act of Aug. 2, 1946, Chap. 753, Title I, Par. 2, Sec. 121(q), 60 Stat. 828), undertook an investigation into alleged Communist infiltration of the motion picture industry (L. R. 137-139).

Plaintiff and a large number of other persons were subpoenaed to attend a Committee hearing in Washington,

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<sup>3</sup>Plaintiff's presentation of the evidence is so incomplete and so highly selective that defendant feels compelled to make its own presentation. Some specific criticisms of plaintiff's presentation will be made later.

<sup>4</sup>Hereinafter for convenience referred to as the "Congressional Committee" or the "Committee".

D. C., which commenced October 20th and ran through October 30, 1947 (L. R. 712, 713, 876, 704). Among the persons so subpoenaed nineteen thereof became known as the "unfriendly witnesses" (L. R. 239), among whom were the plaintiff, Adrian Scott, John Howard Lawson, Lester Cole, Dalton Trumbo, Albert Maltz, Alva Bessie, Herbert Biberman, Samuel Ornitz and Edward Dmytryk (L. R. 239, 240, 253), who became known as the "ten men" (L. R. 240).

Before the hearing in Washington was over, eleven of the unfriendly witnesses were called to the stand—eight preceding and two following plaintiff (R. 739-741). One of these unfriendly witnesses was a Mr. Brecht, who was not catalogued as one of the "ten men". He was a visitor in this country, was about to return to Germany, and, when called to the stand, answered all questions addressed to him by the Committee (L. R. 422, 423).

Before setting forth the relationship between the ten men, we will set forth the testimony of plaintiff when called to the stand<sup>5</sup> (L. R. 330-335).

"Mr. Selvin: The next one of the ten who testified, and I believe the date was October 29, 1947, was Mr. Adrian Scott, and the record is as follows, after Mr. Scott was sworn:

'Mr. Stripling: Mr. Scott, will you state your full name and present address for the record, please?

'Mr. Scott: My name is Adrian Scott. My address is 603 North Beverly Drive, Beverly Hills, Calif.

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<sup>5</sup>At the trial of the instant case there was produced a sound motion picture of the appearance of the "ten men" before the Committee (L. R. 431, 588; Exs. H and E).

‘Mr. Stripling: When and where were you born?’

‘Mr. Scott: In New Jersey, on February 6, 1911.’

‘Mr. Stripling: What is your occupation?’

‘Mr. Scott: I am a producer.’

‘Mr. Stripling: How long have you been a producer?’

‘Mr. Scott: I believe it is a little over 2 years.’

‘Mr. Stripling: Are you here before the committee in response to a subpoena served upon you on September 19?’

‘Mr. Scott: I am.’

‘Mr. Stripling: And in response to a telegram sent to you on October 11 by the chairman calling for your appearing on October 29; is that right?’

‘Mr. Scott: Yes, that is right.’

‘Mr. Stripling: Do you have a statement, Mr. Scott?’

‘Mr. Scott: I do have a statement which I would like to read. I believe the statement is pertinent. It deals with “Crossfire” and anti-Semitism,’

‘The Chairman: Just a minute. We are trying to read the statement.’

‘Mr. Scott: Thank you.’

‘The Chairman: It is hard to read the statement and listen to you at the same time.’

(After a pause.)

‘The Chairman: This may not be the worst statement we have received, but it is almost the worst.’

‘Mr. Scott: May I disagree with the chairman please?’

‘The Chairman: Therefore, it is clearly out of order, not pertinent at all, hasn’t anything to do with the inquiry, and the Chair will rule that the statement will not be read.’

‘Mr. Stripling: Mr. Scott, are you a member of any guild, either the Screen Directors Guild or the Screen Writers Guild?’

‘Mr. Scott: I don’t think that is a proper question, Mr. Stripling.’

‘Mr. Stripling: Were you ever a member of the Screen Writers Guild?’

‘Mr. Scott: Mr. Stripling, I repeat, I don’t think that is a proper question.’

‘Mr. Stripling: Are you now or have you ever been a member of the Communist Party?’

‘Mr. Scott: May I answer the first question, Mr. Stripling?’

‘Mr. Stripling: You said it wasn’t a proper question.’

‘Mr. Scott: I will see if I can answer it properly.’

‘The Chairman: You said it wasn’t a proper question.’

‘Mr. Scott: I believe it is a question which invades my rights as a citizen. I do not believe it is proper for this committee to inquire into my personal relationships, my private relationships, my public relationships.’

‘The Chairman: Then you refuse to answer the question?’

‘Mr. Scott: The committee has no right to inquire into what I think, with whom I associate.’

‘Mr. Stripling: We are not inquiring into what you think, Mr. Scott.’

‘Mr. Scott, we would like to know—’ Mr. Stripling is continuing to speak. I will reread that. ‘Mr. Scott, we would like to know whether you were ever a member of the Screen Writers Guild.’

‘Mr. Scott: I believe I have answered that question.

‘Mr. Stripling: Mr. Chairman, I ask that you direct the witness to answer the question.

‘The Chairman: The witness will have to answer the question.

‘Mr. Scott: I beg your pardon?

‘The Chairman: The witness must respond to the question by answering.

‘Mr. Scott: I believe I have responded to the question, Mr. Chairman.

‘The Chairman: Do you decline to answer the question?

‘Mr. Scott: I have answered it the way I would like to answer it.

‘The Chairman: Were you ever a member? I don’t know from your answer whether you were or were not a member.

‘Mr. Scott: My answer still stands.

‘The Chairman: Are you a member?

‘Mr. Scott: I believe I have answered the question. Would you like me to answer it in the way I did before?

‘The Chairman: From your answer, I must be terribly dumb, but from your answer I can’t tell whether you are a member or not.

‘Mr. Scott: Mr. Thomas, I don’t agree with you. I don’t think you are. I have answered the question the best way I can.

‘The Chairman: Mr. Vail, can you tell whether he is a member or not?’

I suppose it can be agreed that Mr. Vail was another member of the committee?



Mr. Katz: So stipulated:

Mr. Selvin (continuing):

‘Mr. Vail: No, I cannot.

‘The Chairman: Mr. McDowell, can you tell?

‘Mr. McDowell: No.

‘The Chairman: I just can’t tell whether you are a member.

‘Mr. Scott: I am very sorry.

‘Mr. Stripling: Mr. Scott, could you tell the committee whether or not you are now or have ever been a member of the Communist Party?

‘Mr. Scott: Mr. Stripling, that question is designed to inquire into my personal and private life. I don’t think it is pertinent to this—I don’t think it is a proper question either.

‘Mr. Stripling: Do you decline to answer the question, Mr. Dmytryk?

‘Mr. Scott: Mr. Scott.

‘Mr. Stripling: Mr. Scott.

‘Mr. Scott’—Mr. Scott speaking this time—‘I believe that question also invades my rights as a citizen. I believe it also invades the first amendment. I believe that I could not engage in any conspiracy with you to invade the first amendment.

‘The Chairman: Now, we can’t tell even from that answer whether you are a member of the Communist Party.

‘Mr. Stripling: I repeat the question, Mr. Scott: Can you state whether or not you have ever been a member of the Communist Party?

‘Mr. Scott: I repeat my answer, Mr. Stripling.

‘The Chairman: All right, the witness is excused.’ ”

The statement which plaintiff sought to read as shown by the foregoing testimony was introduced in evidence (L. R. 382-386). Copies of the statement had been prepared with the intention that they should be given to the press and, after Mr. Scott had testified, copies of his statement were distributed to the press, as were the statements of each of the ten men (L. R. 260, 261, 262).

As a consequence of his refusal to answer the questions regarding Communist Party membership and membership in the Screen Writers' Guild, plaintiff was convicted of violating Section 192 of Title 2 of the U. S. Code, was sentenced to a term of imprisonment for one year, and duly served such term (R. 128-131).

The preparations for the hearing before the Congressional Committee and the conduct of plaintiff and the other unfriendly witnesses, were given extensive and intensive publicity through newspaper articles, radio broadcasts, and the actual testimony and news reels. The whole matter was the subject of widespread editorial comment (L. R. 447, 448). The evidence shows, in fact, that the hearings were the leading current topic of news and discussion.

## **2. Plaintiff's Collaboration With and the Conduct of Other Unfriendly Witnesses.**

The conduct of plaintiff at the hearing was premeditated and by no means an isolated incident. The nineteen unfriendly witnesses shortly after being subpoenaed held meetings and discussed the situation (L. R. 240, 408, 876, 879). They jointly employed lawyers to advise them and pooled their resources (L. R. 241-244, 412, 877, 878.) They joined in the issuance of an open letter to the motion picture industry in which they denounced

the investigation and the purposes which they ascribed to the Committee (L. R. 246-254, 878, Ex. A). They conferred together prior to the hearings and with one or possibly two exceptions each of them knew how each of the others was going to conduct himself if called to the witness stand by the Committee (L. R. 413-422). They jointly moved to quash the subpoenas served upon them (L. R. 255-257, 879, Ex. B).

As heretofore stated, eleven of the unfriendly witnesses were called to the stand by the Committee. One of them answered the questions as to membership in the Communist Party, stating in effect that he had been advised that the Committee had no right to make the inquiry but that, because he was an alien and a guest of this country, he felt he should not refuse to answer (L. R. 422, 423). Each of the remaining ten unfriendly witnesses refused to answer questions relative to his membership in the Communist Party. Each of the remaining ten by manner, voice, action and words and with different degrees of violence, challenged the authority of the Committee to conduct the investigation and imputed to the Committee improper purposes in connection with such investigation. Each of the remaining ten unfriendly witnesses had prepared and requested permission to read a statement but only two were allowed to do so. These statements were prepared with the intent that they would be delivered to the press if they were not permitted to be read, and they were so delivered to the press (L. R. 260-262). In general, these statements denounced the Committee and its purposes and in particular they failed to disclose whether the writers were or had been members of the Communist Party.

Within the reasonable limits of a brief it is not possible to do more than characterize the testimony or pre-

pared statements of the seven unfriendly witnesses who preceded and the two unfriendly witnesses who followed plaintiff to the witness stand, but the testimony is set out in full in the Record (L. R. 270 to 348) and the statements appear in the Record (L. R. 351 to 392). The sound motion pictures depicting the conduct of the plaintiff and the other nine unfriendly witnesses who refused to answer questions of the Committee were reproduced before the jury and are available as Exhibits E and H. The conduct, testimony and statement of each of these nine unfriendly witnesses is, in defendant's view of the situation, as much a part of plaintiff's conduct, testimony and statement as though he had done, said and written each of the things done, said and written by each of them.

### **3. The Public Attitude Towards Communism and Communists.**

No evidence of the attitude of the public towards Communism and Communists was introduced, but the trial judge instructed the jury at the first trial that they must take judicial notice of the fact that at the time when plaintiff testified before the Committee and at all times thereafter, a substantial segment of the American public looked with scorn and contempt upon Communism and Communists (L. R. 1101, 1102).

It is fair to state, we believe that upon the retrial the trial judge took judicial notice of this same fact.

### **4. The Public Reaction to the Conduct and Testimony of Plaintiff.**

Peter Rathvon, President of R.K.O. Radio Pictures Corporation during the period involved herein (L. R. 563) testified to his observation that public opinion had crystallized to the effect that the ten unfriendly witnesses

who refused to answer questions regarding their Communist membership (sometimes referred to herein as "the ten men") in defying the Committee had defied the Government and the institutions upon which it was based, and had labeled themselves as Communists and that their conduct had injured the motion picture industry. His statement was based upon the reaction of the executives of the R.K.O. organization, members of the Board of Directors, various organizations, from reading the press, from reports from the so-called Johnston office, and from numerous conversations (L. R. 564-580).

Eric Johnston, President of the Motion Picture Association of America, the so-called Eastern Association, and of the Motion Picture Producers Association, the so-called Western Association, was qualified as a public opinion expert (L. R. 432-449) and testified that it was both his observation and his opinion that because of their conduct before the Committee and, more specifically, their refusal to answer the question relative to their membership in the Communist Party, the ten men (including plaintiff herein), had caused the public to conclude that they were members of the Communist Party and that the motion picture industry was shielding and sheltering members of the Communist Party, "with all of the disrepute which that would bring to a great industry which is extremely sensitive to public opinion" (L. R. 450-455).

Two groups of editorials (Deft. Exs. F. K) were put in evidence by the defendant, and two groups of editorials (Pltf. Exs. 8 and 13) were put in evidence by the plaintiff. Samples of these editorials are supplied in the Appendix. Exhibit "F" consisted of editorials seen by Eric Johnston prior to December 3, 1947, and Exhibit "K" consisted of editorials of a date subsequent to December

3, 1947. Plaintiff's Exhibit "8" consisted of editorials which Mr. Johnston took into consideration in reaching his opinion as to public reaction, but were compiled for the purpose of showing such reaction to an open letter publicized by Eric Johnston under the title "The Citizen Before Congress", which open letter was introduced as Plaintiff's Exhibit "5" (L. R. 461) and was in substance a criticism of the procedural methods of Congressional committees. The editorial exhibits are part of the records on appeal, but because of their bulk were not designated for printing. From an examination of the editorials, it will appear that they were published in newspapers in every section of the United States, that they commented on the Committee hearings generally and on the conduct of the unfriendly witnesses, and that, while opinion was divided as to the hearing itself and certain of its procedural features, the editorials were almost unanimous in their condemnation of the Communist Party and of the conduct of the witnesses who refused to say whether they were members of the Communist Party. Many of the editorial writers drew the inference from such refusal that the ten men were in fact Communists, and stated that their conduct was an insult to the public, that it was contemptuous in fact as well as law, and that it raised doubts as to their loyalty. There were, however, editorials which supported the conduct of the ten men in their refusal to answer the questions of the Committee.

Defendant introduced in evidence (Ex. L) and plaintiff also introduced a quantity of news items (Ex. 13). Exhibits "L" and "13" are a part of the record on appeal, but here too, because of their bulk they were not designated for printing. No attempt is made to summarize their contents, but it may be fairly stated that they indi-

cate the wide newspaper coverage given to the hearing before the Committee and the conduct of the ten men.

On cross-examination Eric Johnston testified that in reaching his opinion he had probably taken into consideration radio broadcasts by the "Committee for the First Amendment" on October 26th and November 2, 1947 (L. R. 528, 529). Sound records of these broadcasts were played to the jury and the phonograph records are in evidence (Ex. 15). Statements made in these broadcasts by Senator Kilgore of West Virginia, Senator Thomas of Utah, Thurman Arnold, Evelyn Keyes and Miss Myrna Loy were read separately to the jury (L. R. 529-534, Exs. 11, 12). These broadcasts were criticisms of the Committee and contained statements justifying plaintiff and his colleagues in their conduct before the Committee.

Mr. Johnston also testified on cross-examination that he had taken into consideration a report dated December 17, 1947, by Audience Research, Inc. of its findings relative to the public reaction to the Committee's investigation of Communism in Hollywood (L. R. 485, 486). This report was put in evidence (Ex. 9, L. R. 486, 492). It shows, among other things, that since the Committee hearings, "the proportion thinking there are at least some Communists in Hollywood has risen from 55 to 61% (R. 489), that 47% thought the unfriendly witnesses should be punished, and 39% thought they should not" (L. R. 488) and that "The principal adverse effect . . . so far has been to give a segment of the American public one more reason for staying away from the movies" (L. R. 491).

Over defendant's objection that it was not material (L. R. 753), evidence was introduced to the effect that subsequent to October 30, 1947, pictures upon which plaintiff received screen credit were distributed by defendant and that defendant does not have any *written* communications from motion picture exhibitors relative to the continued showing of such pictures or threatening to cancel any exhibition contract because of the ten men or because of their citation for contempt (L. R. 755).

**5. The Action of Defendant With Respect to Plaintiff.**

Mr. Scott testified before the Committee on October 29, 1947. The matter of his conduct and what should be done by the defendant by reason of such conduct was elaborately discussed at meetings of the Executive Committee of defendant which were held on November 12, 13, and 22 (L. R. 847-855, R. 60-73). At the meeting of November 22, 1947, the following resolution was adopted (L. R. 850):

“Resolved, that it is recommended to R.K.O. Radio Pictures, Inc. that said Edward Dmytryk and Adrian Scott be discharged from their employment under the ‘moral’ clauses of their respective contracts with the said Picture Company and authorize the President and the studio head to take such steps.”

On November 26, 1947, plaintiff's employment was terminated by a notice in writing delivered to him and signed on behalf of defendant by its president (R. 87, 88).



6. Relative to the Issue of Condonation or Waiver.<sup>6</sup>

a. MATTERS OCCURRING BEFORE PLAINTIFF TESTIFIED.

Dore Schary was a vice president of defendant and at all times pertinent here was in charge of its picture production. It was Mr. Schary from whom plaintiff received his orders (L. R. 236).<sup>7</sup>

Both Scott and Schary were subpoenaed to appear before the Committee. Scott was subpoenaed in September, 1947. After Scott was subpoenaed and before he left for the Washington hearing (R. 97), a discussion was had with Schary (R. 74) concerning which Scott testified:

Schary said that the studio was not interested in Scott's politics but only in his ability to make pictures. This was also the attitude of Mr. Rathvon and the studio. Scott would have the support of Schary and the studio, and the industry would be behind him.<sup>8</sup> Schary read to Scott

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<sup>6</sup>Although plaintiff's brief herein does not argue either condonation or waiver, he sets out in his "Statement of the Case" the evidence which on the first trial was made the basis for such arguments. It is only the evidence on this issue and the difference in the wording of the "morals" clause which differentiate this case from the *Lardner* Case.

<sup>7</sup>It is stated in plaintiff's brief (p. 5) that it was stipulated that plaintiff was qualified to perform his services as a writer and producer. While it was stipulated that plaintiff duly performed all writing, directing, and producing services required of him (R. 22), defendant made clear its refusal to stipulate that Mr. Scott was "able" to meet his contractual obligations after his appearance before the Congressional Committee (L. R. 238, 239).

<sup>8</sup>Mr. Scott does not disclose as to what he was to have this support, but it is perhaps fair to say that it appears in his subsequent testimony that he and Schary agreed that this hearing might be an attack on "progressive film-making" (R. 77), and that Schary told him that the industry was opposed to the investigation and felt it was an attack upon "the screen's freedom" (R. 75).

a statement which he said he was going to read to the Committee (R. 75). Schary, in the course of the discussion, spoke of a pamphlet with which he might be confronted, which he had written concerning the anti-Semitic, anti-Negro, and anti-United Nations activities of John Rankin, a member of the Committee (R. 76).

The only request that Schary made of Scott was that he conduct himself in a mannerly fashion before the Committee. Schary did not tell Scott he should refuse to answer questions asked by the Committee, and his conduct before the Committee was of his own volition (R. 78).

(On cross-examination) Scott testified further:

He believed it was before the "unfriendly witnesses" began to testify that he determined how he would testify (R. 97, 98). In his conversation with Schary before he went to Washington he did not tell Schary that he was going to associate himself with a group that was going to defy the Committee and refuse to answer questions asked by the Committee. The group had not determined at that time how they would answer or whether they were going to answer at all (R. 98). Scott did not tell Schary whether he was or ever had been a member of the Communist Party (R. 99). What Schary told him about the attitude of the industry toward the hearing was that the industry was going to fight any suggestion that there was any Communist propaganda in any of its pictures (R. 99, 100).

Dore Schary testified in substance regarding this discussion as follows:

He told Scott that his job was safe, that the Studio "could not inquire" into the political activities of employees

and that the studio's only concern was their ability (L. R. 691).

He told Scott he had helped write a pamphlet which was an attack on Rankin and that he might be under attack if Rankin sat on the Committee (L. R. 691). The pamphlet was leveled against the personality and record of Rankin and was not an attack on the Committee. He believed some of the Committee's procedure was dangerous (L. R. 693). He had the intention of making a strong statement before the Committee attacking its "techniques" and he read this proposed statement to Scott. He changed his mind about making the statement. He did not inform Mr. Scott that he had changed his mind (L. R. 695).

Schary told Scott he intended to answer all questions asked by the Committee (L. R. 695).

Schary told Scott he had induced a trade paper to write "the first article" attacking the technique or procedure of the Committee and challenging the charge that there was Communist Party propaganda in motion pictures (L. R. 700, 701).

On behalf of the unfriendly witnesses as a group, their attorneys requested and held a meeting with Eric Johnston, President of the Eastern and Western Associations, and Messrs. McNutt and Benjamin, counsel for the Associations. This meeting took place the night before the hearings commenced. It was concerned with a discussion of the motion to quash which was being filed by the unfriendly witnesses and of the position which the Associations intended to take at the hearing. In these discussions plaintiff's attorneys were told that the motion picture industry had publicly welcomed the investigation,

asking only for a fair hearing, and so could not join in any attack on its validity or legality. Mr. Kenny testified that at the end of the meeting Mr. Johnston was asked if there were any truth in rumors that there would be an industry blacklist of men who resisted the Committee, and he replied there would be no blacklist so long as he was President (R. L. 625-641, 759, 766). Mr. Johnston testified that the answer to this query was only to the effect that Mr. Johnston had made no agreement with the Committee (L. R. 763-765).<sup>9</sup>

Nothing was said at this meeting as to what the attitude of Mr. Kenney's clients (the "unfriendly witnesses") would be in the event they were asked about their Communist Party membership. The question did not come up (R. L. 641). Mr. Kenney stated, however, that if the motion to quash was denied, his clients would answer all pertinent questions of the Committee (L. R. 637).

During this meeting Mr. McNutt, counsel for the Producers' Association (L. R. 627), said that the producers were going to make the same fight that Wendell Wilkie made for the motion picture industry before the Nye Committee (L. R. 631).

Before Mr. Scott took the witness stand, certain public statements had been made by representatives of the motion picture industry. Included in this category was an open letter to Congress signed by Eric Johnston and published as an advertisement in a number of newspapers. The gist of the letter was a suggestion that Congressional investigative procedure be overhauled so as to make more secure the rights of individual citizens, protect them

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<sup>9</sup>Plaintiff's brief (16) sets out the testimony of Mr. Kenny but not that of Mr. Johnston.

against defamation and smearing, and give them an adequate opportunity to be heard (L. R. 461, Ex. 5). Included also was a press and radio statement issued by Mr. McNutt (L. R. 467, 468, Ex. 3, L. R. 471, 472, Ex. 3), in which he insisted that the hearing had demonstrated that there was no Communistic propaganda in pictures and in which he said that he would advise the industry against concerted action to compile a blacklist of Communists, as such action would not be in accord with an announced policy of Congress, or rulings of the Supreme Court.

Before Scott's appearance before the Committee, Eric Johnston had testified that there was an executive session of the Committee in Hollywood in June, 1947, and after that meeting Johnston had proposed a three point program to the Producers' Association (L. R. 493), and that one point was an agreement not to employ proven Communists (L. R. 496). Johnston was convinced at the time the Association refused to agree to this, that their reasoning was sound (L. R. 499).<sup>10</sup> Mr. Johnston also testified at the same time, at some length and with considerable emphasis, that he would not, for a variety of stated reasons, employ any proven Communist in the motion picture industry (L. R. 517-522).

When Scott took the witness stand, seven of the "ten men" had testified. Each of them had refused to answer questions as to Communist Party membership and the Committee had recommended that each of them be cited for contempt. These facts were known to Scott before he testified (L. R. 260).

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<sup>10</sup>Although plaintiff's brief refers to the foregoing statements and testimony, no effort was made to prove that any of this matter was known to plaintiff at the time he testified before the Committee.

b. MATTERS OCCURRING AFTER PLAINTIFF TESTIFIED.

Mr. Scott testified that after his return from Washington he worked in the studio every day until he was discharged (R. 82). Following his testimony he had several conversations with Mr. Schary:

The first of these was a telephone conversation in New York in which they both spoke "a little bit" about the hearings and Schary said they should forget about them, go back to the studio and attend to their job of making pictures (R. 80, 81).

The second conversation was in Hollywood and, in response to an inquiry by Scott, Schary said he didn't know what was going to happen (R. 81). Scott asked him about the effect of the hearings on the "jobs of everybody" and Schary said he thought there would be an "unannounced blacklist", which Schary thought was "pretty terrible" but he would continue men on the basis of their ability (R. 83). Schary also said that he resented the "sell-out" of the industry, that the industry was "to stand up and fight against the Committee" and that he alone took the agreed position. Schary thanked Scott for conducting himself in a mannerly fashion and said "he personally resented being made the Patsy of the hearing" (R. 82).

There was a second Hollywood conversation with Schary, Scott said, in regard to a "statement" in which Scott was willing to say that he was opposed to the overthrow of the government by force and in case of war was prepared to fulfill his citizenship obligations. Schary approved the statement. Schary gave the statement to Rathvon on the intercommunication system and told Scott Rathvon was not satisfied with it (R. 83, 84).

On cross-examination Scott testified further as to these conversations and in effect as follows:

It was Scott who sought the first meeting in Hollywood with Schary for the purpose of ascertaining what his status might be as a result of the Washington hearings (R. 101, 102). As a result of his conversation with Schary he "was apprehensive" as to what might happen to his job.<sup>11</sup>

Schary testified to this effect concerning these conversations with Scott:

Schary recalls no telephone conversation with Scott in New York (L. R. 701). He does not recall and does not believe he had any conversation in which he said to Scott that "they should forget the hearings and go back to Hollywood and make pictures, that that was their job."

Schary remembers these discussions with Scott in Hollywood (L. R. 702, 703). He told Scott that he still took the position that he had taken in Washington, *i. e.*, that a man's employment had to be based on his ability rather than on any political affiliation (L. R. 704). Scott asked specifically whether Schary thought Scott's job was in danger and was told that Schary thought a great deal of pressure was being put on the industry (L. R. 705). Schary told Scott that, despite Schary's personal stand, the pressure of public opinion and pressure groups might result in trouble. Later "we" tried to get Scott to sign an affidavit which "we" thought might protect his position with out board of directors who were insisting as he told Scott that we get a non-communist statement from him (L. R. 705). Scott was willing to

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<sup>11</sup>None of this testimony is set forth in plaintiff's "Statement of the Case".

sign an affidavit saying he was not in favor of any party that would overthrow the government by force but not one which would specifically state that he was not or had not been a communist. Schary told Scott that the affidavit he proposed was not acceptable to Rathvon. He told Scott this meant he was probably in trouble (L. R. 707).<sup>12</sup>

Mr. Schary told Scott that the issue with the Committee had not been properly joined; that they should have told the Committees very quietly that they thought the Committee had no right to ask such a question; that they should have then left the stand, should have called a press conference and should have told the press whether or not they were communists and that they had refused to answer the question in order to find out whether there was a constitutional challenge involved.<sup>12</sup>

In Schary's testimony before the Committee he testified that he would not employ a communist if it were established that a communist was a person dedicated to the overthrow of the government by force (709, 710).<sup>12</sup>

On Scott's return to Hollywood he had several conversations with Peter Rathvon, the President of the defendant and concerning these he testified:

Scott was in Mr. Rathvon's office when he received the notice of his discharge. Mr. Rathvon had first handed him a letter which stated that if he went on voluntary suspension and if he was acquitted in the courts and if he signed an affidavit that he was not and never had been a member of the Communist Party, he could then resume his contract "at the point at which these facts were de-

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<sup>12</sup>This evidence does not appear in plaintiff's "Statement of the Case".



terminated." He asked Rathvon for an opportunity to consult his attorney and was told he could not but had to sign the letter at once. When he refused he was handed his discharge (R. 85, 86).

On cross-examination Mr. Scott testified further:

Scott had a conversation with Rathvon between his first and second conversations with Schary following his return to Hollywood. Rathvon did not express approval of Scott's conduct before the Committee—on the contrary (R. 103). Mr. Rathvon asked Scott to make a statement about his "political affiliations." Scott said he would discuss this with his attorneys (R. 104).

Rathvon said the situation was a very bad one as a result of the hearings in Washington, that feeling against the industry was "snow-balling" and something had to be done. He told Scott that no one who was a communist could work for R.K.O. (R. 108, 109). He left no question in Scott's mind but that he would be fired if he did not make a satisfactory statement about his "political affiliations" (L. R. 110, 111, 112).

Scott talked over with his attorney the matter of making such a statement as Mr. Rathvon demanded and then he had the talk with Schary in which as above set out he told Schary what he would be willing to say and learned this was unacceptable to Rathvon (R. 113, 114).

After this conversation with Schary, Scott had a further conversation with Rathvon. Scott was accompanied by Mr. Kenny as his attorney. Scott was not prepared to make a declaration that he was not and never had been a member of the Communist Party and so advised Rathvon (R. 114, 115). The previous conversation with Rathvon was at the end of the first or early in the second

week of November (R. 107). It took place at Rathvon's request (L. R. 564). This second conversation occurred on November 22 (R. 116).

There was a third conversation with Rathvon on November 26 after Mr. Kenny had left for New York (R. 116), and it was this conversation at which Scott received his notice of discharge after again refusing to make the statement required by Rathvon (116-120).<sup>13</sup>

Mr. Rathvon's testimony, through his deposition, concerning his conversations with Scott, insofar as they related to Scott's discharge, is, in substance, as follows:

He was, as president, the chief executive officer of the defendant (L. R. 563).

In the forepart of November, 1947, he called Mr. Scott into his office and told him he should take a stand that would enable the studio to have a "clear-cut position in relation to him." Rathvon told Scott the latter should make a declaration about his political beliefs. He told Scott the "ten men" had put on a disgraceful show before the Committee, that the public thought they had defied the government, that they had flaunted the institutions of their country and that they were communists and some step had to be taken to head off "a growing wave of activity against our industry" (L. R. 563-566).<sup>14</sup>

Mr. Rathvon was not asked about his further conversations with Scott.

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<sup>13</sup>None of this evidence appears in plaintiff's brief except that which relates to Scott's talk with Schary when he ascertained his proposed statement was unsatisfactory to Rathvon and that which relates to the final Scott-Rathvon interview.

<sup>14</sup>This evidence of Rathvon is meagerly set forth in plaintiff's brief.

*R.K.O. Executive Committee Meetings.*

The minutes of a meeting of the Executive Committee of defendant held November 12, 1947, show in substance (L. R. 853-855; Ex. I):

The problems arising out of the Washington hearings were reviewed. Schary complained that he had been subjected to newspaper criticism for testimony which was in line with the position the industry had agreed to take. It was agreed that Scott and Dmytryk (another employee of R.K.O.) had by actions and associations "brought themselves into disrepute with a large section of the public", had offended the community and prejudiced R.K.O. Mr. Silverberg gave his "off-hand" legal opinion that they had violated their contracts. It was requested that he advise definitely on this proposition.

The minutes of an Executive Committee meeting held November 13, 1947, show in substance as follows (R. L. 851-853):

It was the consensus that if, in the opinion of counsel, the company had the right so to do, the contracts of Scott and Dmytryk should be terminated. Counsel stated that he was examining the legal questions involved.

The minutes of an Executive Committee meeting held November 22, 1947, show in substance as follows (L. R. 848-851):

After discussing the conduct and associations of Scott and Dmytryk, the public reaction thereto and the resulting prejudice to the company and the motion picture industry and after being advised by legal counsel that the services of Scott and Dymtryk could be rightfully terminated,

there was adopted the resolution recommending termination which has hereinbefore been set out.<sup>15</sup>

Mr. Rathvon testified relative to these Executive Committee meetings in substance as follows (R. 60-73):<sup>16</sup>

Everyone present at the first meeting, including Schary, thought the "ten men" had performed a great disservice to the industry but on the remedy of discharge Schary was at variance with the rest of us. Schary and Rathvon were both hopeful that we could get some sort of statement from Scott and Dmytryk that might make it unnecessary to discharge them. We were all much concerned and felt that something had to be done (R. 68, (69)).<sup>17</sup>

#### **7. Supplementing and Correcting Certain Items in Plaintiff's Statement of the Case.**

Before the Washington hearing there were meetings at the residence of Mr. Robinson and Mr. Milestone (Pltf. p. 7). Mr. Dmytryk was questioned as to whether at these or *prior* meetings there were discussions of the attitude the 19 "unfriendly witnesses" would take if asked by the Committee concerning Communist Party membership. His statement was to the effect that at these meetings "No one attitude or procedure was . . . recommended over any other" (L. R. 408-413).<sup>18</sup>

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<sup>15</sup>None of the evidence drawn from the Executive Committee minutes is set forth in plaintiff's brief.

<sup>16</sup>We shall limit this to matters pertaining directly to the matter of Scott's discharge and in that matter shall seek to avoid repeating that which has been dealt with in the minutes.

<sup>17</sup>This evidence is absent from plaintiff's brief.

<sup>18</sup>As it appears in the brief (7) one might be lead to believe that the statement was not limited to the Milestone and prior meetings, particular as the arrangement in the brief (7, 8) seems to make it a part of another immediately quoted statement by Dmytryk (8).

At page 8 of plaintiff's brief Dmytryk is quoted as saying that there was never a group discussion in which there was a group decision as to the attitude to be taken by the unfriendly witnesses when called before the Committee. When Dmytryk made this statement, he was being questioned about the activities of the "unfriendly witnesses" after these earlier meetings and at any time before they appeared before the Committee (L. R. 407-414). He testified as follows:

We had our discussions (as to what their attitude would be if questioned by the Committee regarding Communist membership) in small groups (L. R. 414). There was a specific reason for not discussing this in the group as a whole; one of our attorneys pointed out that the group as a whole should not discuss this subject because it would lay us open to a charge of conspiracy (L. R. 414, 415). Each of the "unfriendly witnesses", with one or possibly two exceptions, knew before he took the stand how each of the others was going to conduct himself if called to the witness stand by the Committee (L. R. 413-422).<sup>19</sup>

At page 9 of his brief plaintiff seeks to indicate that Eric Johnston's opinion as to the public's reaction to the conduct of the "ten men" was limited to the expression "unfavorable". Mr. Johnston's more extended opinion has been referred to under our heading "The Public Reaction to the Conduct and Testimony of Plaintiff."

At page 14 of his brief plaintiff states that Rathvon's view of the state of public opinion was based on "newspaper reading, Legion Post resolutions and on material furnished him by the Motion Picture Producers Associa-

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<sup>19</sup>There is no reference in plaintiff's brief to this evidence.

tion.” The basis of Mr. Rathvon’s opinion was much broader than this (L. R. 563-573).<sup>20</sup>

At pages 16 and 17 of plaintiff’s brief there is set out a stipulation to the effect that the pictures in which Scott had worked continued to be exhibited and, in pursuance to the terms of his contract Scott received screen credit. The stipulated facts were admitted over the objection of defendant that the evidence went beyond the issues and was not material to the issue of waiver (L. R. 643, 752-756).<sup>21</sup>

### C. The Findings of Fact and Conclusions of Law.

The retrial of the case (after a new trial had been granted following the verdict in the original trial) had been delayed pending a decision by this court in the *Lardner* case (R. 141).

Because the content of the Findings and Conclusions must be dealt with in some detail in the argument, the content is not set out at this point.<sup>22</sup>

### D. Judgment.

The judgment was that plaintiff take nothing, that the case be dismissed on the merits and that defendant recover costs (R. 57, 58).

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<sup>20</sup>The testimony concerning the nature and basis of the opinions of Johnston and Rathvon is identical with that presented to this court in the *Lardner* case.

<sup>21</sup>This identical situation was before this court in the *Lardner* case and this court held that defendant’s objection was sound (216 Fed. 844 at 854).

<sup>22</sup>The Findings (except on the issues of “inducement” and “waiver”) are based upon the identical evidence (except as to the wording of the “morals” clause) which was before the court in the *Lardner* case and are consistent with what in that case this court determined to be the effect of that evidence. The Conclusions are those which in the *Lardner* case this court decided flowed properly and necessarily from that evidence.

## ARGUMENT.

### Preliminary.

Since plaintiff's brief contains no argument upon the issues of "inducement" or "waiver", we shall assume—justifiably, we believe—that plaintiff concedes that these issues were properly decided against him.<sup>23</sup>

We shall present briefly our own contention to the effect that the findings are supported by the evidence and warrant the conclusions of law.

### The Findings Are Supported by the Evidence.

The issues of inducement and waiver being eliminated we have in this case (except for some unimportant differences in the wording of the "good conduct" clauses of the employment contracts) the identical evidence which was before this court in the *Lardner* case. If then it should appear that the "good conduct" clause in this case is in substance the same as the "good conduct" clause in the *Lardner* case, this court's decision in the *Lardner* case would be conclusive on the proposition that the Findings in this case are supported by the evidence wherever the Findings conform to determinations concerning the effect of the evidence in the *Lardner* case.

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<sup>23</sup>In his Statement of the Case plaintiff set forth favorable (to plaintiff) but incomplete evidence which had no bearing on any issue except "inducement" or "waiver".

The "Good Conduct" Clause in This Case Is the Equivalent of the Corresponding Clause in the Lardner Case and, Since the Evidence Concerning Scott's Conduct Is Identical With That Concerning Lardner's Conduct, the Discharge of Scott Was Equally Justifiable.

In the *Lardner* case this court referred to its decision in *Loew's, Incorporated v. Cole*, 9 Cir., 185 F. 2d 641 and set out in parallel columns the "morals" or "good conduct" clauses in the Cole and Lardner contracts (p. 848), stating in effect that the *Cole* and *Lardner* cases had a similar origin in the appearance and similar conduct of Cole and Lardner before the Committee and that in each case the employer justified the discharge of the employee under the "good conduct" clause (pp. 847, 848).

This court in the *Lardner* case discussed the significance of the conviction of Lardner for refusal to answer whether he was a member of the Communist Party. It pointed out that in the *Cole* case a provision in the "good conduct" clause that Cole "would conduct himself with due regard for public conventions" necessarily "includes an agreement to refrain from a misdemeanor of this character" and stated that the provision in the Lardner contract that Lardner "shall not conduct himself 'in a manner that shall offend against public decency, morality, etc.'" is an equivalent provision (p. 850).

In the case at bar the "good conduct clause requires plaintiff to (1) "conduct himself with due regard to the public conventions and morals etc." and provides further, among other things, (2) that plaintiff "will not do anything which will tend to . . . bring him into public disrepute . . . or tend to . . . offend . . . public morals or decency . . ." Provision (1) is



stronger than the corresponding provision in the *Cole* case. Provision (2) is as strong as or stronger than the corresponding provision in the *Lardner* case.

Since the evidence as to plaintiff's conduct is substantially identical with the evidence as to Lardner's conduct and since this court declared in the *Lardner* case that Lardner's conduct was such that his employer was justified in discharging him for violating this "good conduct" clause, we respectfully submit that the trial court correctly found in the case at bar that this defendant was justified in discharging plaintiff herein for violating plaintiff's "good conduct" clause (Finding XI, R. 54, 55).<sup>24</sup>

There were findings in this case that the Committee held closed and public hearings regarding Communist infiltration of the motion picture industry, that a public hearing was held in Washington, D. C. on October 20 to 30, 1947, that all matters pertaining to such hearings received the widest possible publicity and aroused and sustained public interest, concern and discussion throughout the United States and elsewhere (Finding VI, R. 52, 53); that the expressed attitude of such industry that there was no such infiltration but that the industry would cooperate fully in the investigation was widely publicized (Finding VII, R. 52); that nineteen of the persons subpoenaed for the Washington hearing, including plaintiff, agreed as to the manner in which they would conduct themselves before the Committee, that eleven of such nineteen were called as witnesses and ten thereof, including plaintiff, refused to answer questions of the Committee as to whether they were or had been members of the

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<sup>24</sup>Finding XI and only Finding XI is prefixed by the statement "In pursuance to the case of *20th Century Fox v. Lardner*, 216 F. 2d 844, the court finds that:—".

Communist Party (Finding VIII, R. 53); that as a result of such refusals on November 24, 1947, the House of Representatives referred the report of the Committee in regard thereto to the United States Attorney for the District of Columbia to the end that plaintiff and the others who had refused to answer might be prosecuted, that the report of the Committee and the resolution of the House were widely publicized throughout the United States and elsewhere (Finding IX, R. 53, 54); that the plaintiff and such other persons were duly indicted and convicted of the crime defined in Section 192 of Title 2 of the United States Code and that such conviction was based upon their refusals to answer pertinent questions asked by the Committee, including the question as to Communist membership (Finding X, R. 54); that the discharge of plaintiff by defendant was in good faith and for good cause (Finding XII, R. 55); and that plaintiff has not been damaged in any amount by any act or omissions of defendant (Finding XIV, R. 56).

Each of the Findings to which reference has been made was supported by evidence substantially identical with that which was before this court in the *Lardner* case and in the *Lardner* case that evidence was interpreted by this court in such manner as to justify these findings.<sup>25</sup>

### The Conclusions of Law Are Proper.

The Conclusions of Law are to the effect that plaintiff was discharged justifiably, that the right to discharge was not waived, that the conduct which gave rise to such right

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<sup>25</sup>Plaintiff contends that the statement prefixed to Finding XI to the effect that it is made pursuant to the *Lardner* case limits the effect of the facts there found. Without conceding plaintiff's contention we earnestly assert that, even if Finding XI were omitted, the Conclusions of Law would be warranted.

was not condoned and that defendant is entitled to judgment.

Upon examining the findings, either including or excluding Finding XI, we discover the same ultimate facts that caused this court to decide in the *Lardner* case that the employer was justified in discharging the employee.

If what has been said by us regarding the Findings and Conclusions is sound, the judgment of the trial court should be sustained.

While we have thought it necessary to refer to the evidence in this case at some length (mainly because of plaintiff's highly selective presentation) we shall not, having established that it is substantially the same as in the *Lardner* case, belabor this court with legal arguments which have already been made by this court in the *Lardner* and *Cole* cases.

It remains to discuss the arguments presented by plaintiff even though we respectfully submit that what has been heretofore said demonstrates defendant's right to the judgment entered in the trial court.

### **The Order of the Trial Court Granting a New Trial Was a Proper Exercise of Discretion.**

As we read plaintiff's brief it is his contention that, since there was no conflict in the evidence concerning what Scott did or concerning the surrounding circumstances and because the jury determined that what he did was not a breach of his contract, the trial judge abused his discretion in granting a new trial on the ground that the jury's verdict was against the great weight of the evidence. This contention is a far cry from the contention of plaintiff in the trial court in the first trial, as

may be seen from the arguments made by plaintiff to the jury (L. R. 996-1015, 1062-1087) and, also, a far cry from the manner in which this same evidence was interpreted in the brief of Lardner in the appeal to this court. When the trial court determined that the verdict was against the weight of the evidence the trial court properly considered the evidence upon many disputed points. Most, if not all, of the evidence is now before this court for the third time and we spare the court a detailed discussion of the contentions of plaintiff and his fellows which by this time the court knows as well as do the parties to this appeal.<sup>26</sup>

But the court also granted the new trial on the ground that "to permit the verdict to stand would be a miscarriage of Justice" (R. 46). In its motion for a New Trial defendant relied upon various errors of law (R. 40) in the admission and exclusion of evidence and in the instructions to the jury. Certain of these contentions of defendant were determined to be sound and substantial in the *Lardner* case. Since plaintiff directs his argument solely to the alleged impropriety of granting the new trial on the ground that the verdict is contrary to the weight of the evidence we feel that we should not burden this court further than by pointing out that the order for a new trial was justified upon this other ground, as well as upon the ground which plaintiff attacks.

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<sup>26</sup>We do not of course, concede plaintiff's proposition that the trial court could not set aside the verdict because it was contrary to the weight of the evidence and we direct attention to *The Connemara*, 108 U. S. 352, 360; *Charles v. Norfolk & Western Ry. Co.*, 188 F. 2d 691, 695; *Rodegir v. Phillips*, 85 F. 2d 995, 996; *Woodward v. Atlantic Coast Line R.R.*, 57 F. 2d 1018.

## **It Is Not the Differences but the Similarities in the Scott and Lardner Contracts That Are Controlling.**

We have heretofore presented the similarities in the Scott and Lardner "good conduct" clauses and have demonstrated, we trust, that since the evidence in the *Scott* and *Lardner* cases is substantially the same, the determination by this court in the *Lardner* case that the evidence showed a breach of the "good conduct" clause, even if it is not controlling as a matter of law, is equally applicable in the *Scott* case.

## **Scott's Conduct Was a Violation of the "Morals" or "Good Conduct" Clause of His Contract.**

Without abandoning any arguments heretofore made we deal here solely with plaintiff's argument that late decisions of Supreme Court of the United States make it clear that Scott's conduct was not a violation of his contract. This argument assumes that the sole reason for holding that Scott had breached his contract was his conviction for contempt of Congress based upon his refusal to answer the questions of the Committee. Obviously, the assumption is not sound. If there had been no conviction it would still be true, under the authority of the *Lardner* and *Cole* cases, (1) that Scott had not conducted himself with due regard to public conventions and morals (2) that he had done things which tended to bring him into public disrepute and which tended to shock and offend the community and public morals and decency (3) which prejudiced his employer and (4) which lessened his capacity to fully comply with his contract obligations.

*Quinn v. United States*, 349 U. S. 155, and *Fagenbaugh v. United States*, 232 F. 2d 803, do no more than hold that, *when a witness has invoked the Fifth Amendment* in refusing to answer, the witness is not in contempt unless the Committee makes it clear that it has overruled his claim of privilege and then specifically directs the witness to answer.

In Mr. Scott's testimony before the Committee (L. R. 330-335) he was asked (a) whether he was a member of the Screen Writer's Guild and (b) whether he was or had been a member of the Communist Party. Mr. Scott refused to answer either question and did not invoke the Fifth Amendment.

Plaintiff says (36) that in view of the *Quinn* and *Fagenbaugh* decisions it is clear that "Mr. Scott's conduct would not today be thought to constitute an offense. He was not at any time directed to answer the questions propounded to him."

Scott was specifically directed to answer the question as to membership in the Screen Writers' Guild and to it he interposed no Constitutional objection (L. R. 331-334).

We need not debate the proposition that Mr. Scott's conduct would not today "be thought to constitute an offense" because as the record stands and will continue to stand he was convicted of a specific offense and he must face the consequences of that conviction.

We cannot leave unchallenged, however, plaintiff's assertion that under the decision in *Slochower v. Board of Ed.*, 100 L. Ed. (Adv. p. 449), no implication whatever may be drawn from the failure of a witness to answer a Congressional inquiry.

In the *Slochower* case there appears the statement quoted in plaintiff's brief (pp. 36, 37) to the effect that the court condemns "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", that it is an improper assumption that those who claim this privilege are either criminals or perjurers, and that the privilege "would be reduced to a hollow mockery if its exercise could be taken as equivalent to a confession of guilt or a conclusive presumption of perjury". This is strong language even though it is dictum in a case which was decided on the ground that the discharge of Slochower was wrong because it violated the due process requirements guaranteed by the Fourteenth Amendment. However, even the dictum is related to a situation in which the Fifth Amendment is invoked and there was no such invocation in the case at bar.

Even if the quoted statement was not dictum and even if Scott had invoked the Fifth Amendment, it could hardly be claimed to overcome the California authorities to the following effect:

When evidence is suppressed or withheld by a party in control of such evidence, the natural inference arises that the evidence would be unfavorable to such party. It is not necessary to ignore such inferences in order to preserve the party's constitutional privilege against self incrimination. The privilege is to protect the party from compulsory disclosure of facts associating the party with a crime. It would be an unjustifiable extension of the privilege to hold that not only could the party not be compelled to make such a disclosure but, in addition, that no inference might be drawn from the refusal to answer. It is not the purpose of the privilege to enable the claim-

ant of the privilege to prevail in non-criminal proceedings in which the guilt or innocence is not involved in so far as criminal liability is concerned. All inferences except that of guilt are permissible.

See:

*Fross v. Wotton*, 3 Cal. 2d 384;

*Spath v. Seager*, 39 Cal. App. 2d 10;

*In re Berman*, 105 Cal. App. 37;

*Stillman, etc. v. Watson*, 115 Cal. App. 2d 440;

*People v. Richardson*, 34 Cal. App. 2d 528.

### **The Findings of Fact Warrant the Conclusions of Law Despite the Prefix to Finding XI.**

As we have sought to demonstrate under our heading "The 'Good Conduct' Clause In This Case Is The Equivalent Of The Corresponding Clause In The Lardner Case And, Since The Evidence Concerning Scott's Conduct Is Identical With That Concerning Lardner's Conduct, The Discharge Of Scott Was Equally Justifiable" the findings are sufficient to warrant the Conclusions of Law even if Finding XI be excluded. However, we by no means concede that it must be excluded by reason of the prefix. The prefix is surplusage which may be disregarded in view of the declaration of the trial court which precedes *all* the Findings: "The Court having duly considered the matter, makes its findings of fact and conclusions of law as follows" (R. 49, 50). Even if we disregard the effect of this—as we believe—controlling declaration, the court's statement amounts to no more than our oft-repeated assertion in this brief that since the evidence in the case at bar relative to the matters covered in Finding XI is substantially identical with the evidence in the *Lardner*



case relative to the same matters, the findings conform to this court's interpretation of the similar evidence in the *Lardner* case.

Finally, if as plaintiff contends, Finding XI is a Conclusion of Law, then upon the authority of the *Lardner* case it is warranted by the findings of fact and is no less effective because it appears amongst such findings.

### Conclusion.

We respectfully submit that for the reasons and upon the grounds set forth and upon the authority of the *Lardner* and *Cole* cases the judgment herein should be affirmed.

Respectfully submitted,

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## APPENDIX.

### SPECIMENS OF EDITORIALS CONTAINED IN DEFENDANT'S EXHIBITS "F" AND "K."

Texarkana, Ark., Gazette, Nov. 24, 1947:

#### TRAITORS IN THE FILMS.

Every member of the Communist party is an enemy of America. There is no doubt about that. And Communists in America are seeking to bring about the downfall of this country, just as they are seeking to bring about the downfall of a large number of countries in Europe.

The most recent and dangerous Communistic activity in this country was brought to light in the Thomas committee's probe of Un-American activities in the moving picture industry. The films form the most popular medium of amusement in America. Men, women and impressionable children see them. No greater appeal to human emotions and sensibilities can be imagined.

Filmland delighted the Communists as a soil admirably adapted to the spread of their doctrine. They have been at work for some time. Paul V. McNutt, an eminent attorney and political leader, has been retained apparently to assist Eric Johnston to cover Communistic propaganda in the films. Wendell Willkie apparently was employed for the same purpose some years ago.

A great publicity campaign is being carried on by actors, actresses, screen writers, directors, Johnston and McNutt to delude the American people and to threaten the members of the Thomas committee and others, who are asking only a simple question: Are you a Communist? Evidently these people prefer a citation for contempt rather than to tell their true names and to answer whether or

not they are Communist, points out George E. Sokolsky in his syndicated column.

An honest man does not hesitate to make public his correct name, address, religious, political and fraternal affiliations, and to do so under oath. The only ones who dare not take such an oath are those who fear the charge of perjury and its consequences. Therefore, it seems clear to us that those Hollywood people who howl freedom of thought and speech, but who refuse to answer honest questions before a committee representing the people of their country, are not honest American citizens and the implication is apparent that they are Communists or "fellow travelers."

The American people will welcome whatever facts can be brought to the surface, so that they may be safeguarded against the forces that wrecked and ruined country after country in Europe. If the Thomas committee proves that the movies have not been used corruptly, then that is to the credit of the motion picture industry. If it is proved otherwise, then the people should know and should know who are the offending actors, directors, script writers and others in the film industry were or are. We do not have to declare war to catch traitors.

Bridgeport, Conn., Telegram, Oct. 30, 1947:

#### COMRADES IN HOLLYWOOD.

In this free country it is most difficult to understand why anyone in his right mind would want to be a communist. Communism thrives on spreading suffering and misery until free people, either through desperation or by force, accept the "fuller and richer life" promised by those who have never even tasted of a full or a rich life.

It is beyond our understanding why anyone should prefer hunger, cold, labor slavery, poverty, sickness and slow leath—which is what the people get from their communist rulers—in preference to the full life and happiness of free America.

But, in this country, if a person wishes to be a communist, a believer in the morbid existence that communism offers, he may be one. He can speak or write about communism, can address public meetings or use the government mail service to spread his subversive doctrines. Native communists and imported ones like Eisler can hire halls and receive police protection during meetings even though they are obviously against the public interest.

In Washington the House Committee on un-American Activities is probing the extent of communist infiltration in Hollywood. It is merely trying to show the American people how far these comrades have wormed their way into the motion picture industry. The committee is doing nothing to infringe upon producers,' writers' or actors' civil liberties, nor is it making anyone's personal beliefs a test of employment. The committee is making no attempt to abridge any of the "rights" of communists in this free land.

Despite all the noisy criticism of commies and their friends that the rights of a free press and speech and radio are imperiled, that the Bill of Rights is being trampled upon, etc., etc., the Committee has clearly shown that there are scores of people in the so-called movie capital who seek to foist the "fuller and richer life" upon Americans by plugging the party line in films, and in a manner which they could not possibly do openly.

The finger is on them, and they know it. They have sneaked into jobs, key spots in the industry, and for all we know, may be taking orders direct from a foreign power. It is obvious from the start that they seek through the screen to influence the beliefs and the morals of the American people. Although they may not have been too successful, the public's interest and right to know what they are doing, is not lessened.

The Hollywood people have made a ridiculous defense and the screaming of those who refused to admit their affiliation with the communist party, has caused great damage to the motion picture industry in this country. Even though reams of publicity are being created in Washington, which is supposed to be the lifeblood of the industry, it is not good publicity. It is the sort that undermines the faith of the people in a legitimate American activity.

Since it is no crime to be a communist, we can find at least a modicum of respect for one who is willing to stand up and be counted, but none, not even a grain of respect for those who hide themselves under the cloak of respectability, yet carry on in secret the sabotage of decent Americanism.

Rockville, Conn., Rockville Leader, November 13, 1947

#### THE HOLLYWOOD INVESTIGATION.

The investigation into Communist activities in Hollywood was on the whole hardly an edifying spectacle. Several facts have emerged however, which cannot be disputed: there are Communists connected with the motion picture industry; these Communists have attempted to inject the party line into pictures; to date these attempts have been thwarted by the industry itself.

Certainly it is difficult to imagine any place where Communist propaganda could do more harm than in motion pictures which are seen by millions of people of all ages. Educators are agreed on the value of visual aids in teaching, and the Communist party line, injected into films, would have an insidious effect. The fact that such propaganda has been kept out of pictures speaks well for the ability of the industry to police itself.

Whatever may be one's opinion as to the tactics employed by members of the investigating committee, and much could be said on this matter, anyone who believes in the American form of government cannot fail to be disgusted with those screen writers who refused to give a straightforward "yes" or "no" to the question as to whether or not they are or have been members of the Communist party. Any real American should be glad to answer with an emphatic "no." Refusal to do so has laid these individuals open to the suspicion that they actually are Communists. Had they answered "yes" one could have respected their willingness to stand up for their convictions while abhorring their beliefs.

The most sensible statement was made by Eric Johnston, spokesman for the motion picture industry. Mr. Johnston said that he would welcome an investigation of Communism in the movies provided it followed court procedure where the accused had an opportunity to defend themselves against any irresponsible charges. He also expressed himself as being strongly opposed to government censorship. Until the industry shows that it is powerless to censor itself, most people will agree with Mr. Johnston. Political censorship can lead to as great evils as those which it censors.

Frankly, it seems a little ridiculous to hound Communists and still allow the Communist party to exist. J. Edgar Hoover, head of the FBI, has opposed outlawing the party on the grounds that such action would only drive the Communists underground where it would be more difficult to keep track of them. Mr. Hoover unquestionably knows more about the problem than most people, but it is a question that deserves serious consideration. It seems increasingly to be less a legitimate political party than a group which desires to overthrow the government by force and takes its orders from a power outside the United States. As such, it hardly seems to deserve a place on the ballot.

Columbus, Georgia, The Columbus Ledger :

#### WHAT IS THIS "FREEDOM"?

Those Hollywood people who seek to wrap themselves in the American Flag in order to hide their Communist affiliations have a little of the appearance of trapped rats as they snarl and heckle the Congressional committee which is seeking to disclose "red" infiltrations.

Ordinarily, we believe we are as devoted to "civil liberty" as anybody. Ordinarily, we would agree with the contention that a man's political conscience is his own affair.

*But there are some men and women who do not—and in the nature of their vocations cannot—lead "private" lives. Public office holders cannot claim total privacy of thought and action. Neither can those who write books or, for that matter, those who edit magazines or newspapers. And neither can those who make the nation's motion pictures.*

Such men and women sacrifice a good deal of their privacy simply because they have elected—and it is wholly



a matter of their own free choice—to follow callings which have such an obvious impact in shaping public opinion that the masses of the people have special prerogatives when it comes to inquiring about their political beliefs.

The people, in a word, *have a right to know* what makes such men and women “tick.”

They have a right to ask whether they be Democrats, Republicans, Socialists or Communists—or whether they have any political belief at all. Otherwise they cannot judge with certainty what shapes the opinions and the philosophies which are daily being expounded.

In a very special sense, Hollywood scenarists are not entitled to complete privacy in their political lives, because they wield an extraordinarily potent weapon of propaganda, readily susceptible of *secret perversion*.

And this, indeed, is what is charged against the Hollywood writers! They are not alleged to have operated a Communist propaganda openly—as is done, for example, by *The Daily Worker*, the officially recognized organ of the Communist party in the USA.

*They are charged, rather, with having operated the Communist propaganda surreptitiously—with “Feeding” the Moscow “line” into films supposedly designed for entertainment only. And it is supremely important for the American people to know if this charge is true or false.*

We have, therefore, little patience for, and no sympathy with, those men and women who prepare the nation’s movie scripts, but who won’t say—when haled before the bar of public opinion—just where their political loyalties really lie.

If they are not Communists, they should not hesitate to say so, and they should not resent being asked.

If they are Communists, not only the public but the producers of motion pictures have a right to know it.

In all such matters, fair-minded people ought to ask themselves: "What is freedom, really?"

If we may give our own answer to that question, we would have to say that freedom is *not* the right to wrap oneself in the American Flag whilst serving, surreptitiously, the policies and idealogies of a foreign power.

It is not the right to pollute the nation's intellectual stream—its books, its periodicals and its motion pictures—with any dangerous "ism" injected by subterfuge.

And it is not the right to refuse to answer honest questions honestly.

*As regards Communism, it is no longer possible to view it as simply another political party, operating sincerely within the free American political system. It must now be viewed, rather, as a formidable international conspiracy, managed from abroad and with the avowed objective of destroying the American idea.*

Thus any legally-constituted Committee of Congress has a right and duty to inquire of any man in public life (and Hollywood scenarists *are in* public life) whether they be Communists. Such inquiries have, unhappily, become necessary in order to protect the national security, and if they represent the beginnings of American "concentration camps"—so be it.

Maybe, indeed, that is where we ought to put all the Communists, and let them stay there until they rot.

Decatur, Ill., Review, Nov. 22, 1947:

### HURT FILM INDUSTRY.

Hollywood is alive to the fact that the ten men connected with the motion picture industry who refused to answer questions before the House un-American activities committee have cast a shadow over the industry. Eric Johnston, president of the Motion Picture Association of America, says they did "a tremendous disservice."

Citation of the ten men for contempt has been approved by the full committee of the House and the House probably will pass on the charge next week. The men refused to answer on constitutional grounds which may be their right, but in refusing to answer the general public did not follow the technical point made, which must be determined by a court, but read only that the men refused to say where they stood.

In this country a man is considered innocent until he is proven guilty but when he refuses to answer questions the public jumps to the conclusion that he has something to hide. Refusal to talk added to the fire of suspicion that perhaps there is something wrong in Hollywood.

The film industry denies the charges hurled at it by the House Committee but the refusal of the ten men to talk has not helped the industry defense and it is not likely that the industry will come to the defense of the ten men who Mr. Johnston says "have done a tremendous disservice to the industry which has given them so much in material rewards and an opportunity to exercise their talents."

New Orleans, La., States, Nov. 28, 1947:

### HOLLYWOOD DECISION.

To sever a worker from his bread and butter under circumstances that might make it difficult for him to make another suitable connection is not a matter to be passed off lightly. Hollywood movie executives must have sensed this when they held a two-day closed meeting to decide the fate of 10 figures cited for contempt of Congress. It was not easy, obviously, to reach a decision.

But the film writers implicated brought their predicament upon themselves. They insisted on keeping secret the matter of their membership or party-line affiliation with the Communist party. Mere membership in the Communist party is less repulsive to the American public, we are inclined to believe, than the snakiness of Commy methods and activities. Our people want all political activities conducted open and above board. This is the traditional American way. Any other system, is Ku Kluxism and when that erupted a few years ago, public sentiment and public action put a foot down promptly and impressively.

It is snaky and contemptible and base to be secretly a member of the Communist party, then pretend not to be or to be something else. It is plain political treachery. It is thumbing the nose at American ideals and traditions. Let the Commies do as other political groups do—openly and honestly proclaim their affiliations, alliances, doctrines, objectives and loyalties. Then public opinion could deal with them—in the American way.

Lewiston, Me., Sun., Oct. 28, 1947:

NO CAUSE FOR EVASION.

The House Un-American Activities Committee probe of Hollywood for possible subversive activity gains more and more attention as it goes along. After several days testimony last week by "friendly" witnesses—those willing to make allegations of Communist activity in the movie colony—the committee ran into opposition yesterday.

In a turbulent forenoon session, a screen writer, John Howard Lawson, was put on the stand. Evidence was given to the effect that he had held a Communist party card several years ago. Then he was asked the plain question whether he is, or ever was, a Communist. He refused to answer, and the committee voted to cite him for contempt of Congress.

Lawson claimed that the committee had no right to question anyone as to their political beliefs. But the courts have frequently held that these congressional committees have very wide powers, as some of the nation's big financiers found out 11 or 12 years ago when Wall Street was the target. What we have cautioned against more than once is the misuse of congressional investigatory powers, and the committee will earn more confidence from American citizens, if it discards all hearsay evidence and sticks to proven facts.

\* \* \*

Getting back to Lawson's refusal to answer, we think he should have replied to the committee's question. If he is not a Communist, and never was one, there is no reason why he could not have answered in the negative. If he is a Communist, or has belonged to the party, that is admittedly an unpopular admission to make at this time.

But we have quite a few people in this country who are enough different from their fellows as to be conspicuous in their beliefs or their way of life. Some think nudism is all right, and they are frequently made fun of as a result. Some hold to odd religious beliefs, others are vegetarians and firmly refused to eat meat. The price they all pay for non-conformity is a degree of public notoriety, and those who are sincere must put up with it.

Perhaps we can put Communists in this class, and leaving aside the question of whether or not they are working for violent overthrow of the government, their membership in the party inevitably singles them out. There is no law against being a Communist here, any more than there is against being a vegetarian or a sun-worshipper. But the very fact of refusing to admit or deny it, before a congressional committee, multiples public suspicion. They should answer yes or no, and if in the affirmative, follow up by asking the Congressmen what they are going to do about it. Because there just isn't anything Congress can do.

Haverhill, Mass., The Haverhill Gazette, Oct. 30, 1947:

#### BEYOND COMPREHENSION.

Why an American should refuse to put his political affiliation officially on record is something quite beyond our comprehension.

Such refusal, however, has become common since agencies of government began to search out Communist influence in American life.

Some trade union leaders have chosen to be insulted by the idea anybody should ask whether they are Communists.

Now we have Hollywood personalities refusing to answer a congressional committee's questions as to their political affiliations.

Communism is an aggressive force obviously striving to destroy every American institution and to level every American standard.

This is a proposition that needs no more demonstration than the proposition that a thief in the house is a bad man to have around.

Obviously, therefore, the government that tries to root Communism out of the life of the country is acting with the wisdom of the householder who calls the police when he suspects the presence of a thief.

When an agency of government turned toward Hollywood in its search for Communism, it acted wisely.

Motion pictures are perhaps the most powerful propaganda force in the world. If no Communist agents had got into the movie industry, it would be a strange situation indeed.

The congressional committee had impressive evidence from important figures in the industry, that Communists are doing their evil work in Hollywood. The committee logically followed this evidence with subpoenas to some of the suspected persons.

One suspected person after another refused to answer the committee's question on the ground that asking their political affiliation was an improper invasion of their privacy.

This is a flimsy refuge from an accusing force.

In the minds of the people, we think, these screen persons, by their refusal to co-operate with the committee, perhaps unjustly, have condemned themselves.

Detroit, Mich. Detroit Free-Press, Oct. 28, 1947:

MOST UN-AMERICAN OF ALL  
THE COMMITTEE.

The most un-American activity in the United States today is the conduct of the Congressional Committee on Un-American Activities.

It is so viciously flagrant a violation of every element of common decency usually associated with human liberty that it is foul mockery on all that Jefferson and Lincoln made articulate in their dreams of a cleaner and finer order on earth.

The hypocritically named "committee on Un-American Activities" should be abolished at the earliest possible moment by the United States Congress and so deeply buried that no other group of publicity-mad zealots could ever again be allowed to tarnish with their stench the greatest institution of our democracy, our halls of legislation.

This Committee is possessed by a denial of human freedom generally associated with the Directorate in the French Reign of Terror, with the Soviet mass slaughter trials, and the Hitlerian blood purges.

No wonder that Stalin, Molotov, Vishinsky and others of that breed [sentence missing] good names for the sheer sadistic glee of getting headlines should be allowed to exist.

\*

This newspaper has no defense to make of many of the rotten conditions that exist in Hollywood. But we do applaud the courage of the motion picture actors and actresses and the others who work in the films for fighting



against this latest outrage on the part of the fanatical witch hunters.

Paul V. McNutt, their counsel, has demanded that the Committee furnish proof of its blanket accusations of Communism against the industry.

This is an astounding development for these Congressionally protected slanderers.

"Look," they must say in amazement, "our victims are asking us to produce evidence of our charges! How absurd! We never prove our accusations. Our job is merely to smear."

The greatest single weapon within the power of our Government is the power of inquiry so that democracy shall always be cleansed before the eyes of the sovereign people. So vital is it that it should forever be safeguarded as sacred and held inviolate.

But the "Un-American Committee" has prostituted that great function and has dragged down with it to the gutters our great Palladium of human liberty.

Let Congress abolish this smear gang.

Such inquisitions belong to the dark ages of the New Deal.

Grand Rapids, Mich. Grand Rapids Press, Dec. 1, 1947:

#### RED CLOUD OVER HOLLYWOOD.

The motion picture industry, obviously gravely concerned over the bad publicity it has been receiving lately as the result of the congressional inquiry on Communism, has fired the 10 employes cited for contempt by the Thomas committee and barred Communists from its pay rolls.

While some may contend that the industry was unduly hasty in dismissing the accused before anything actually had been proved against them, it isn't easy to defend the 10 men, since they did little or nothing to defend themselves against the committee's charges and allegations. And even those persons who have been most critical of the committee's methods, or who have insisted that even a congressional committee has no right to pry into a man's political affairs, will find it difficult to blame the picture people for being jittery. They are in the business of selling a mass-communication product and, if they hope to stay in business, they must be unusually sensitive to the currents of public opinion.

There can be no doubt that the American people are concerned over possible Communist activities in their country and are likely to be suspicious of any industry charged with harboring Reds in influential positions. The case against the accused is not based on any claim that they succeeded in getting Communistic propaganda into their finished product—for they obviously didn't succeed in doing that—but is based on the belief that the nation can't be too careful in protecting itself against such a possibility.

The whole incident is particularly unfortunate because some of the men cited worked on some of the finest films of the last few years. But as a group they haven't done much to encourage sympathy for their cause. On the stand they put on a show with a script which sounded as if it had been written by Red propagandists, and in denouncing their dismissal they handed out some more of the same with the charge that their firing was only part of an "attempt to control films, books and science in order to facilitate the dissemination of anti-democratic, anti-

semitic, anti-Negro and war-inciting doctrine." Do they expect the American people to believe that ridiculous charge or to accept it as proof of their loyalty to democratic principles?

Nesho Mo., Democrat, Nov. 26, 1947:

#### FUEL FOR HYSTERIA.

President Eric Johnston of the Motion Picture Association of America indicted 10 film writers and directors who refused to answer questions of the House Committee on Un-American Activities. He declared these men did "tremendous disservice" to the industry. He thinks they should have stood up and been counted "for whatever they are." Mr. Johnston is perfectly right.

An array of circumstantial evidence was lodged against each of the 10. Refusal to answer the committee's question, "Are you a Communist?" left a smudge against the industry. Perhaps some were imbued with the esoteric conviction no one has the right to delve into Communist activity in the United States. The public conviction certainly is that these men balked at the query because they had something to conceal.

It is encouraging to find Mr. Johnston lashing out at such conduct and declaring again that Hollywood has no place for subversives. Perhaps, as he asserts, they fed the fires of hysteria and added to confusion. But the confusion is probably within the industry which doesn't know just what to do with them.

If these 10, or any of them, are Communists they had little alternative. They were forced to button up their testimony, face charges of perjury or by admitting Communist affiliation divorce themselves from cushy film jobs.

St. Louis, Mo., Post Dispatch, Oct. 30, 1947:

THEY WOULDN'T SAY "YES" OR "NO."

Apparently, J. Parnell Thomas is having some success in identifying Hollywood figures as Communists. Ten writers, producers and directors have been cited for contempt for refusing to give a "yes" or "no" answer to the question: "Are you a Communist?" Acting obviously under advice of counsel, the 10 men declined to answer on the ground that it is an improper question, or that they are protected by the Constitution from inquiry into their political beliefs.

It strikes us that the question is quite proper, and we know of nothing in the Constitution that is apropos. Surely, the witnesses cannot refer to that clause of the Constitution which protects a person from self-incrimination. If that clause, indeed, as the one they are invoking, it is an admission by the witnesses that they regard membership in the Communist party as a violation of penal law. That would be playing right into the hands of the committee, which is seeking, in fact, to outlaw the Communist party.

While the performance of the House Un-American Activities has fallen far short of ordinary standards of congressional dignity and has smacked of cheap melodrama, the behavior of the eight men cited for contempt is equally bad. If they are Communists—and the committee has introduced evidence to that effect—their refusal to admit it leaves a very bad taste in the mouth.

Usually men who belong to belligerent minorities or who espouse unpopular causes are happy and proud to make open avowals. These men are not in that mold.

Instead, they hide themselves behind the Constitution of the United States, the very document that Communism would destroy if it had a chance. It is a strange and depressing spectacle.

Newark Star-Ledger, Nov. 27, 1947:

### HOLLYWOOD GETS WISE.

The executives of the movie industry, meeting in New York, have decided to suspend immediately and without salary the 10 Hollywood personalities who have been cited for contempt of court by the House Committee on Un-American Activities. The film executives have also decided to discharge all Communists and to refuse to employ Communists, while at the same time taking care to guard against hasty and mistaken judgments of suspected persons.

This action by the film executives is to be applauded, although it is rather belated. More impressive would have been action by the industry immediately, when these 10 Hollywood personalities refused to state whether or not they were Communists.

The Communists and their misguided apologists have succeeded in distorting the issue, contending that the civil rights of the accused persons are at stake. This is a clever bit of obfuscation, since it is the civil rights of all the people that are at stake in the continuing conspiracy of the Communists to destroy our way of life.

The basic issue in the struggle over communism is civil rights. It is decidedly untrue that the basic issue is one of economic or social reform. The Communists contend, in practice as well as in theory, that they cannot carry out their program without establishing a dictatorial gov-

ernment and suppressing the freedoms of those to communism.

Those who believe in civil rights thus have the duty of eliminating Communists from positions where they weaken our democratic processes and poison our intellectual food at its source. Their right to expel Communists from positions of influence should be qualified only by painstaking regard for justice in considering borderline and disputed instances.

The 10 Hollywood personalities involved in the contempt citations do not admit they are Communists, and some of them may not be. That is not quite the issue. Their refusal to assert under oath that they are not Communists makes them undeserving of positions of influence and power, and dangerous to the cause of civil rights.

The film industry has at last been aroused to its responsibility in protecting itself and the country against the Communist enemies of civil rights. The principle it has at last recognized—that enemies of civil rights should not be sheltered or tolerated in position of trust and influence—should be extended throughout the fabric of industry, business, politics and government.

Patterson, N. J., News, Dec. 3, 1947:

#### AN UNWISE AND DISASTROUS WEAKENING OF THE DEMOCRATIC PROCESS.

Every loyal American will emphatically agree with Eric Johnston of the Motion Picture Association that the ten movie industry employees who refused to tell the House Un-American Activities Committee whether or not they were Communists have “done a tremendous disservice to the industry” and “hurt” the cause of democracy immeasurably.

Even those who were appalled by the committee's conduct of some phases of its recent hearings can find scant justification for the attitude of witnesses who contemptuously refused either to admit or deny membership in the Communist Party. The Bill of Rights guarantees every American broad freedom to think and speak as he pleases, but it guarantees him no right to wear false colors or to cloak his propagandist efforts in secrecy.

The issue raised by the Hollywood investigation in this respect could not be more cogently or thoughtfully presented than in the recent report of the President's Committee on Civil Rights. No one would question the sincerity of this committee's regard for civil liberties, yet it urges, for the express purpose of "strengthening the right to freedom of conscience," that legislation be enacted to require "all groups, which attempt to influence public opinion, to disclose the pertinent facts about themselves through systematic registration procedures."

"One of the things which totalitarians of both left and right have in common," the committee observes, "is a reluctance to come before the people honestly and say who they are, what they work for and who supports them. . . . We do not believe in a definition of civil rights which includes freedom to avoid all responsibility for one's opinions. This would be an unwise and disastrous weakening of the democratic process. If these people wish to influence the public . . . they should be free to do so. But the public must be able to evaluate these views."

In urging the registration of all opinion-swaying groups, the Civil Rights Committee makes it plain that "our purpose is not to constrict anyone's freedom to speak; it is

rather to enable the people better to judge the true motives of those who try to sway them." The "principle of disclosure," in short, is "the appropriate way to deal with those who would subvert our democracy." And that—all ballyhoo and indiscretions aside—is precisely the principle which the House Un-American Activities Committee was created to serve, and did in fact serve with its Hollywood hearings.

Buffalo, N. Y., News, Oct. 31, 1947:

#### HOLLYWOOD DEFIANT.

In its investigation of Communism, the House Un-American Activities Committee laid itself open to criticism for entering hearsay testimony in the public record. This procedure was condemned as violating the spirit of the Bill of Rights.

But the committee cannot be criticized for putting to Hollywood writers and others appearing before it the question whether or not they are or have been Communists. This is a legitimate question; it is entirely consistent with the purpose for which the committee was created—to determine the extent and character of un-American activities and the spread of anti-American propaganda within the United States.

Certain of the Hollywood screen writers insolently refused to answer the question; and they very properly were held in contempt by the committee. In announcing the conclusion of the "first phase" of the investigation, Chairman J. Parnell Thomas did not indicate whether the committee was closing the book on Hollywood. The strange part of it was that Eric Johnston, president of the Motion Picture Association of America, should have



given countenance to the recalcitrant screen writers by charging that the committee was using unfair methods in relation to them, such as would create "a damaging impression of Hollywood."

This is plain hogwash. It is the defiant and arrogant screen writers who are creating a damaging impression. By their attitude they inferentially lend support to previous testimony that Communists have infiltrated into the industry—whether or not they themselves are Communists. Obviously, those who are Communists have been intent on insinuating Moscow propaganda into the movies. All such are missionaries of that faith; this is a condition of party acceptance. All Communists are un-American—enemies of the American way of life.

The Government has a right to know who in the motion picture industry are Communists, just as it has the right to know who among the labor leaders are of that faith. In short, it has the right to protect itself against their designs. They hold themselves subject to the dictates of a foreign power, a power which is waging a "cold war" against the United States. In the circumstances, a thoroughgoing American could hardly feel that he had good reason to refuse an answer to the question: Are you a Communist?

New York Herald Tribune, Oct. 22, 1947:

#### HOLLYWOOD IN WASHINGTON.

The first two days of testimony upon Communism in Hollywood before the House un-American Activities Committee have produced exactly what was expected of them: an abundance of unsubstantiated charges, some dizzying new definitions of Communism and a satisfactory collec-

tion of clippings for Mr. J. Parnell Thomas's scrapbook. A good many citizens of Hollywood have been called Communists, to the evident delight of Mr. Thomas and his witnesses. One man has already been thrown bodily from the hearing room, and Mr. Bartley Crum escaped the same fate only because he was able to swallow his sense of indignity just before Mr. Thomas struck.

There are, without doubt, circumstances under which such an investigation as this one would be proper. If the moving pictures were undermining the American form of government and menacing it by their content, it might become the duty of Congress to ferret out the responsible persons. But clearly this is not the case—not even the committee's own witnesses are willing to make so fantastic a charge. And since no such danger exists, the beliefs of men and women who write for the screen are, like the beliefs of any ordinary men and women, nobody's business but their own, as the Bill of Rights mentions. Neither Mr. Thomas nor the Congress in which he sits is empowered to dictate what Americans shall think.

Some attempt was made to show that Communism was being permitted to creep into films, but in each case the attempt dissolved into the ludicrous. Mr. John Moffit, for example, cited as an example of the party line a scene in which a banker is portrayed as an unsympathetic man—a typical Hollywood stereotype that has been written into moving pictures since long before any Communist menace was noticed on the west coast. Mr. Moffit also firmly assured the committee that forty-four of a hundred Broadway plays constituted Communist propaganda, without mentioning how the fact has so far escaped the notice of Broadway.

No doubt the revue is still only in its preliminary scenes, and Mr. Thomas has a good many more acts to trot out before he rings down the curtain. To date he has brought forth nothing to make the whole affair seem anything more than an attempt to seek personal aggrandizement on the taxpayer's funds. Not Hollywood but Congress is being investigated here, and once again the testimony indicates that the system of Congressional investigating committees needs overhauling. The entire process, in which a committee chairman is allowed unlimited freedom and his targets must remain simply targets, is inherently offensive and should be changed to bring some degree of equity into the proceedings.

New York Herald Tribune, Nov. 27, 1947:

#### COMMUNISM AND HOLLYWOOD.

It is doubtful whether any one, with the exception of Mr. J. Parnell Thomas, will feel happy over the action of the motion-picture industry in firing the ten persons cited for contempt of the Thomas committee and in henceforth barring Communists from the industry's pay rolls. The industry's own unhappiness is evident enough from the tortured language of the announcement, in which respect for justice and civil liberty struggles both painfully and obviously with the desire to escape the embarrassments brought down by Mr. Thomas's hippodrome.

Many will observe that the motion-picture business seems to have got along very well in the past utilizing the services of the evasive ten without discovering Communist propaganda turning up in its products. Many will feel that it is simply a case of a gigantic industry, always notoriously timid and sensitive to any kind of mass reaction, running to cover from popular hysteria, at the ex-

pense of destroying the livelihoods of a few writers and directors against whom nothing has been proved except that they evaded answering as to their political beliefs. It is neither a heroic nor an inspiring attitude. But is it inadmissible?

One cannot blink the fact that this is another of the difficult questions forced upon us by Communism, by its nature, its aims and, in particular, its methods. Communist secrecy and infiltration are facts, and it is difficult to argue that an industry of mass communications is denied by democratic principles the right of protecting itself against them. The ten put on a show before the Un-American Activities Committee which was damaging to the industry. Now they have issued from Hollywood an answering blast, denouncing their dismissal not merely as an invasion of their liberties but as part of an "attempt to control films, books and science in order to facilitate the dissemination of anti-democratic, anti-Semitic, anti-Negro and war-inciting doctrines."

Here is a piece of politically inspired propaganda nonsense of a kind which Hollywood certainly cannot be required to protect or encourage. It is hard to maintain that a mass-communication industry is powerless to deny employment on suspicion of secret membership in a subversive organization. This newspaper believes the power must be conceded; but it certainly should be used as sparingly as possible, and one trusts that the motion-picture industry's insistence on fairness and moderation will be observed.

The Raleigh Times, N. C., Nov. 1, 1947:

### WHAT HAVE REDS GOT THAT OTHERS HAVEN'T?

The Communist Party advocates forceful overthrow of the United States Government, yet it sometimes seems that officials bend over backward to be nice to Communists.

Pin a Red label on someone, and he often can "get away with murder." He can get away with a lot of things which would land a run-of-the-mine loyal American citizen in serious trouble. For, once a Commie is put on the spot all the good brethren put a halo of martyrdom about his marxist head and shed maudlin tears about his "civil rights" and "liberalism." And it is a Communist tradition to yell bloody murder about the Constitution and the Bill of Rights which the Communist Party seeks to destroy.

A disgusting spectacle has just closed in Washington. There, a dozen or so screen writers have been asked the simple question of whether or not they are, or have been affiliated with the Communist Party. To this question they have shrieked defiance at the House Committee on Un-American Activities, a quasi-judicial body, and hurled insults at its members.

In sum, these people consider themselves above the law. Their attitude not only insults the Un-American Activities Committee, but it insults every law-abiding American citizen as well.

If a plain, garden variety of American were to act as these fellows have acted, he would have landed in the well-

known hoosegow in short order. These recalcitrant witnesses have been cited for contempt. If they are not prosecuted vigorously, then the authorities responsible for their prosecution should hang their heads in shame.

And if the big moguls of the motion picture industry permit them to continue writing for the films their action can be construed as a slap in the face of the law abiding public which supports them.

Ashtabula, O., Star Beacon, Nov. 6, 1947:

### THE '\$64 QUESTION.'

Several subpoenaed witnesses appearing before the House un-American Activities Committee in Washington refused to answer what has been called the "\$64 question." This question is "are you now or have you ever been a member of the Communist Party?"

Motion picture writers stood on what they called their constitutional rights and declined to say yes or no. They face court action on charges of contempt as a result of their obstinate refusal to admit or deny they are or have been Communists.

These screen writers, who may have been advised by their attorney not to answer the question, do not make a good impression on public opinion by taking this attitude. For while it is quite possible for one who is not and has not been a Communist to refuse to answer this question, it is suspected that most persons who do not belong to and never have been members of this subversive so-called party would reply to the query without quibbling over constitutional rights.

If someone who disapproved the committee, or its methods, or its personnel, or everything connected with it

and wished to plague and annoy and embarrass it, he might decline to answer although not a Communist.

However, the impression the public will get from the refusal of these men to say whether or not they are or have been Communists is that they may have something to conceal. They make themselves suspect by declining to answer. The committee might call for—if it hasn't done so already—the F. B. I. files made during the war as it checked on Communists in this nation.

Toledo, O., Blade, Nov. 11, 1947:

#### ON QUESTIONS AND ANSWERS.

When we said sometime ago that we did not like the way the House Committee on Un-American Activities goes about smearing witnesses in its inquisitorial hearings, we did not mean that we liked the way some of those Hollywood chaps raved and ranted when they took the witness stand.

Americans standing on their traditional rights as free men in a democratic country don't have to spout forth gibberish. If they are asked questions about their private affairs or political opinions which no one has a right to ask, they can reply bluntly, "It's none of your business" or, if they prefer, "It's none of your blankety-blank business." If they are even asked questions about crimes which they have committed, they can refuse to answer on the grounds that they cannot be required to give incriminating evidence.

But though a free man in a democratic country is not required to answer the questions of police investigating a crime, it is hard to understand why an innocent man

would refuse to do so. And it is equally difficult to understand why a good citizen would refuse to give pertinent information to any duly constituted government body. Just as a law-abiding citizen will want the law enforced, so will a tax-paying citizen want to see government funds wisely spent and carefully checked.

For these reasons, we are glad that the revival of the Hughes inquiry before the Senate War Investigating subcommittee has taken, so far, a saner turn. The committee shouldn't set out to smear the reputation of any citizen. Any citizen should be glad to supply the committee with any information pertinent to its investigation. Only on that basis can all of us continue to enjoy those democratic rights which impose democratic obligations.

Chattanooga, Tenn. Chattanooga News-Free Press:

ONLY ONE VERDICT POSSIBLE.

If a man on trial in a court of law hears positive evidence given against him and fails to deny his guilt or to present any other defense, the jury has no choice but to conclude that he is guilty.

Of course the Hollywood characters who have been called before the House Un-American Activities Committee in its investigation of Communist infiltration into the movie colony are not on trial for any crimes or misdemeanors. But they have been summoned by a committee of the Congress of the United States, which has full legal powers to summon and to question them, in pursuance of its efforts to find out to what extent the Communists have succeeded in gaining a foothold in the moving picture business for the purpose of using the movies for the dis-



emination of their poisonous attacks on American life and American institutions.

Critics of the Hollywood Red probe have seized upon the inevitable pieces of trivia that have turned up in the evidence and have emphasized these in their efforts to discredit the investigation.

The evidence against the Hollywood writers who have refused to tell the committee whether or not they are Communists, however, is not trivial. The committee has heard positive testimony that they are Communists and detailed testimony on how some of them worked to carry out the Communist propaganda scheme in Hollywood. Communist party membership cards identified as those of the accused men have gone into the record.

To date four of the Hollywood figures accused of being Communists have refused to answer this question—John Howard Lawson, who, it has been testified, was the Red “commissor” in Hollywood and instructed Communist writers to get “five minutes of the party line” in every picture; Dalton Trumbo, Albert Maltz and Alvah Bessie.

They have been cited for contempt of the committee and the charges should be pressed with the utmost vigor—against them and against all others who may adopt their tactics. They are not only technically in contempt for their refusal to answer questions; their conduct before the committee has been contemptuous in the extreme.

These men have been denounced as Communists by reliable witnesses. If they persist in their refusal to either confirm or deny the charges, the jury will have no choice in arriving at a verdict. The verdict will have to be one of guilt. The jury in this case is the people of the United States.

Greenville (Texas) Evening Banner, Oct. 30, 1947:

### STRANGE DEFIANCE.

An American who is not affiliated with the Communist Party and does not sympathize with its theories in any particular, should not be ashamed to declare publicly that he is not a Communist. Some of the Hollywood big-wags, however, are not saying "yea" nor "nay" to the question: "Are you a Communist?" propounded at the House un-American Activities subcommittee hearing in Washington.

So far ten so-called "prominent" personages of Hollywood have defied the committee and have been cited for contempt. It is probable that more will be cited before the hearing is ended.

It is the contention of the witnesses that the committee has no right to ask questions about political beliefs. Perhaps not, but regardless of the rights of the committee in regard to this particular question, a non-Communist should not hesitate to say that he is not a Communist, especially when he is a witness in a public hearing of national importance. It would be simple to say "no," but if he says nothing he gives both the committee and the public reason to wonder.

Houston, Texas, Post, Oct. 28, 1947:

### RED FILM PURGE.

The dismissal by R-K-O studios of a producer and a director, two of the 10 film characters cited for contempt of the House investigating committee, is good as far as it goes. But the movie industry will not have gone far enough to satisfy public opinion until it fires the other eight men who arrogantly refused to tell the committee whether or not they were Communists.

In fact, the publicity of the investigation has alerted the American people to Red-slanted film propaganda, and henceforth more of them will spot the poison despite its sugar-coating in sweet emotional appeal.

Although the investigators of un-American activities did not probe deeply into the extent of left-wing penetration in the business of making movies, it brought the public a few facts about some of the people who write, direct and produce the film plays, and how they work. And if the industry itself now does not purge the pictures of such fouling, there may be a popular uprising next time.

Producer Adrian Scott's public comment on his discharge is typical of the attitude taken by all Reds, from Molotov on down. He calls the committee's contempt citation a "perversion of justice," and brands it as a "temporary triumph of John Rankin of Mississippi." But more than 300 House members voted to uphold the committee's action and less than a score voted against it.

Mr. Scott and his nine colleagues claimed the right to refuse to divulge their political affiliations under the guarantee of free speech. But Congress has taken the position, and the people will endorse it, that if scenario writers, directors and producers have the right to color their films Red, the public has a right to know who is doing the coloring.

Petersburg, Va., Progress-Index, Nov. 26, 1947:

#### ON THE WAY TO AN ANSWER.

By large majorities the House of Representatives voted contempt citations against ten motion picture writers and directors who refused to tell the un-American activities committee whether they were communists. The matter

now is in the hands of the Justice Department which promises prompt prosecution, with grand jury action coming possibly within a week. While the action of the House in support of its committee is a setback for the view that a person cannot be required to answer the question of Communist affiliation, this does not settle the issue, for it remains to be seen what the courts will do with it.

It does not follow that all or any of the ten are Communists, for though they may have been attempting to hide the fact of party membership they could have refused to answer because they felt their civil liberties were involved. If the un-American committee had conducted its affairs in a more acceptable fashion, relying only upon real evidence and allowing accused persons every opportunity to clear themselves, perhaps we would have been spared some of these performances, but the shortcomings of the investigating committee, serious as they are, do not justify refusal to answer yes or no to the question of Communist affiliation. In the prevailing atmosphere those who take that course need not be surprised to find themselves under greater suspicion than ever.

While the issue goes to the courts there are signs the motion picture industry is doing some housecleaning of its own, which is as it should have been all along. Hollywood's red menace can be sized up by saying it is by no means as great as the hysterical ones would have us believe but has real potential seriousness in that Communists with the usual determination and more than the usual supply of funds have occupied some key positions. An industry which has policed itself in other respects ought to be able to take care of this one, but evidently outside pressure was needed to bring it to the point of doing so.

No. 14985.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, INC., a corporation,

*Appellee.*

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## APPELLANT'S REPLY BRIEF.

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KENNY & COHN,

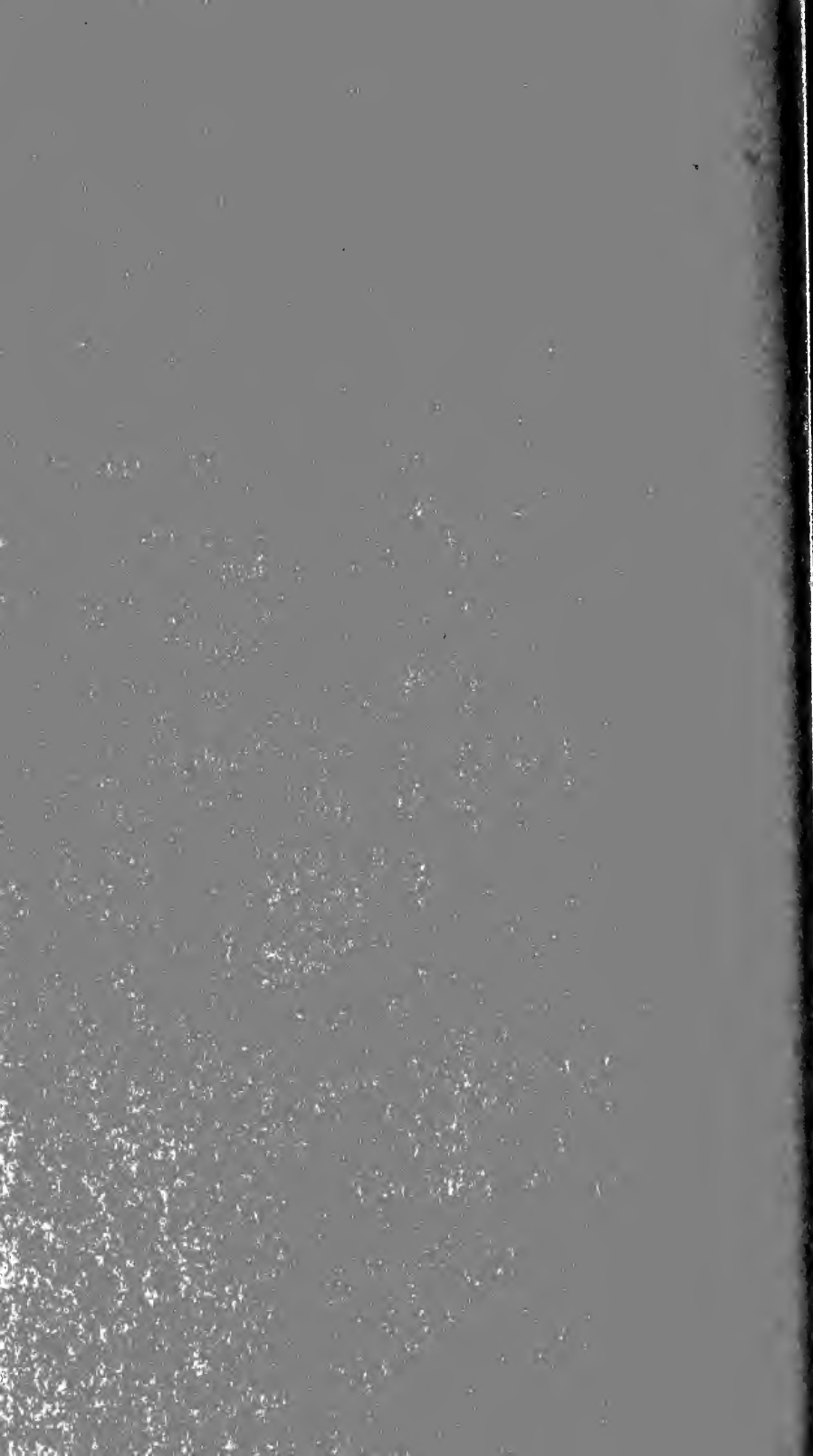
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## APPELLANT'S REPLY BRIEF.

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### Introduction.

Respondent's reply brief fails to notice the fundamental contentions underlying the appeal. While including evidentiary matter and, in an Appendix spread over thirty-four pages, direct quotation from defendant's exhibits, respondent has left untouched the following underlying arguments: (1) the existence of moral turpitude, in the present appeal, presented a question of fact (App. Op. Br., pp. 30 *et seq.*); (2) the *Cole* (185 F. 2d 641) and *Lardner* (216 F. 2d 814) decisions have been, on the point here involved, overruled by the *Slochower* decision in the Supreme Court (350 U. S. 551); and (3) failure to invoke the Fifth Amendment cannot itself make "moral turpitude" as a matter of law of a refusal to answer based on the First Amendment.

Respondent's failure to answer these arguments is especially noteworthy in view of appellant's specific statement (App. Op. Br., p. 42) that the jury's determination of the facts was proper, and there was no basis for setting aside the original verdict. At bottom of appellant's contentions is, among other things, the Seventh Amendment of the Constitution of the United States and the fundamental distinction between the functions of a court and that of a jury. (See *Baltimore v. Redman*, 295 U. S. 654, at p. 657.)

### I.

#### **The Lardner and Cole Decisions Do Not Govern This Appeal.**

Respondent's reliance on the *Lardner* and *Cole* decisions is unfounded, and in any event cannot afford any basis for overturning the jury's verdict in favor of plaintiff.

#### **(a) The Slochower Decision Is Irreconcilable With Cole and Lardner and the Latter Decisions Must Be Deemed Overruled.**

Slochower emphatically condemned the practice of imputing any reprehensible motive to a witness who refused to disclose whether he had been a member of the Communist Party, thus giving the highest support for what each jury who has tried any of the contract cases have found in their verdicts. This was true in *Cole* and in *Lardner*; the same jury which returned the *Lardner* verdict found similarly in the Scott case on the question of breach.)

The *Cole* decision said tentatively (the case was remanded for re-trial on the question of breach), and the

*Lardner* decision expressly held, that refusal to answer questions concerning membership in the Communist Party was conduct involving moral turpitude. Slochower holds just the contrary. It is true that in *Slochower* the witness invoked the Fifth Amendment, while Scott did not invoke that Amendment, but suggested reliance on the First Amendment. It should be remembered that the decision establishing the Fifth Amendment as a shield against these interrogations by Congressional Committees had not been rendered at the time Scott was compelled to decide on a course of conduct. *Blau v. United States*, 340 U. S. 159 (decided Dec. 11, 1950).

But in any event, it is the refusal to answer concerning party affiliation, whether or not the proper Amendment is invoked, which is the heart of the matter. The existence of moral turpitude cannot turn on nice distinctions, such as asserting a privilege or a challenge to a Congressional Committee with the technical precision which, now, hindsight makes possible.

The authorities cited in Appellant's Opening Brief (pp. 31, *et seq.*) and numerous others readily at hand say that moral turpitude is keyed to "commonly accepted mores" (*U. S. v. Francioso*, 164 F. 2d 163) and to the common conscience; that moral turpitude involves "an act of baseness, violence, or depravity" (see *In re O'Connor*, 184 Cal. 584, 194 Pac. 1010). Scott's failure to invoke the Fifth Amendment could not make his refusal to answer depraved, base, or vile.

It is submitted that the *Lardner* and *Cole* cases, insofar as they say or hold otherwise, must be deemed overruled by Slochower.

**(b) In Any Event, the Cole and Lardner Decisions Are Not Applicable.**

Appellant has pointed out (Op. Br. pp. 31-33) significant differences between the Lardner contract and the Scott contract. Specifically, nothing is said in the Scott contract concerning an *offense*, or moral *turpitude*. Respondent says nothing about differences, but argues that in other respects the morals clauses of the two contracts were similar. (Resp. Br. p. 39.) Such an argument is clearly inadequate. The inclusion in Lardner's contract of significant differences in substance cannot be eradicated by showing that in other respects they were similar.

Respondent next argues that Scott's conduct was similar to the conduct of the plaintiff Cole in the *Cole* case and plaintiff seeks to construe the *Cole* decision as holding that Cole's conduct constituted a breach of the morals clause in that contract as a matter of law. But this argument must fail for two reasons. First, the *Cole* decision does not so hold, as will be shown. Second, moral turpitude being a matter of depravity, baseness, a quality of the heart—no prefabricated standard can be imposed, except perhaps in arrant cases; each man is entitled to be charged and tried as an individual.<sup>1</sup> The jury had a right to find, after a full trial, that whatever ignorance or errors in law Scott's counsel may have suffered from, Scott was not guilty of moral turpitude and did not offend against common decency.

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<sup>1</sup>Cf. the following from *Lardner*: “. . . the facts of the *particular crime* of Lardner in refusing . . . to tell the Committee . . . should be held moral turpitude as a matter of law . . . on the record of Lardner's actions before the Congressional Committee . . .” (*id* p. 852).

The *Cole* decision did not hold that refusal to answer constituted a breach of the morals clause as a matter of law. This is plain from the opinion. This court said: "There is no room for doubt as to just what Cole did before the Committee", and having thus eliminated from the case any question of Cole's conduct, the court remanded the case for re-trial (185 F. 2d 662). This order was inconsistent with a holding that his indisputable conduct constituted a breach, because a re-trial would have served no purpose. Indeed, this court said:

"Since the view which we take of the *whole* case requires us to order a new trial, upon which it may well be that the issues will be enlarged, we think it unnecessary to pass upon the contention that no issue whatever relating to waiver should have been submitted to the jury." (*Id.* p. 660.)

Finally, this court in *Lardner* compared the morals clause in that case with that in the *Cole* decision, and said that "Lardner's contract said everything that Coles said *and a little more*" (216 F. 2d at p. 848).

Cole's and Scott's contracts are identical in these particulars: neither includes the language concerning *offense* or moral turpitude. It is plain that the Lardner contract is different in substance from Scott's and contains "a little more."

**(c) The Failure to Answer Concerning Membership in the Writer's Union Is Not a Violation of the Morals Clause**

Respondent implies that in any event Scott's conviction for refusal to answer whether he was a member of the Screen Writer's Guild gave his employer a right to discharge him. (Resp. Br. p. 40.) No argument or authority

in support of this contention is given, and it is submitted that this contention is unfounded.

Even if, contrary to *Slochower*, and the trend of the decisions in the Supreme Court, an inference of membership in the Communist Party is permissible from refusal to answer, and if such an inference is likewise permissible concerning membership in a writer's union, nothing in the record or in the briefs suggests any impropriety by reason of such membership. The instruction given by the trial court in this case that the jury could take judicial notice that a substantial segment of the American public looked with scorn and contempt on Communists [R. pp. 1101-1102] cannot be transferred to membership in a labor union.

A conviction of contempt for refusal to answer a question concerning union membership must fall under *Sinclair v. U. S.*, 279 U. S. 633, as construed in *U. S. v. Murdock*, 290 U. S. 389, at p. 397, in which it was said:

“He refused to answer certain questions not because his answers might incriminate him, for he asserted they would not, but on the ground the questions were not pertinent or relevant to the matters then under inquiry. The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded.” (78 Law Ed. 386.)

II.

**The Order Granting a New Trial and Setting Aside the Verdict Was Erroneous; the Verdict Should Be Reinstated.**

**(a) There Was No Conflict in the Evidence Warranting Judicial Interposition.**

In his Opening Brief appellant has argued at some length that the jury's answer to the special interrogatory finding there was no breach was a determination of fact, and that the presence or absence of moral turpitude in the circumstances of this case, was likewise a question of fact. (App. Op. Br. pp. 30-35.)

Respondent's failure to reply must be taken as conceding these contentions. Further argument from appellant on these points would seem improper.

Respondent says, however, that in passing on the motion for new trial the court passed on "many disputed points" of evidence. But respondent does not cite a single point on which the evidence was in dispute on the question of breach. There was, in fact, no dispute in the evidence, and in view of the fortunate manner of presentation there could be no dispute, as to what Scott did or the circumstances in which it was done.<sup>2</sup> The jury saw and heard motion pictures and dialogue of the very scene and conduct in question, and in addition, had a complete transcript of the entire proceedings.

It is true, differences of editorial opinion concerning Scott's conduct (and the conduct of other witnesses) were

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<sup>2</sup>The same motion pictures were exhibited in *Lardner*, and in that case this court said there was "no dispute as to what the ten men did" (216 F. 2d 850-851).

printed in the press (one extreme of which is reproduced by respondents in the Appendix to its brief). But the comments of onlookers did not alter the facts.

There was no issue of fact to resolve as to what the conduct of the men was. The decisive issue was only whether that admitted and indisputable conduct constituted moral turpitude, for unless Scott's conduct was immoral, depraved, or vile, it could not violate any part of the morals clause. Scott contracted to conduct himself with due regard to public conventions and morals; not to do anything tending to discredit him, or to bring him into disrepute, contempt, or scorn, or tending to shock, insult, or offend the community or public morals, or which would prejudice his employment or the motion picture industry. (The morals clause is reprinted in full at App. Op. Br. pp. 3, 29). But Scott's conduct could not do or be anything forbidden by his contract unless the quality of his conduct was such as to bring it within the base and vile character of moral turpitude.

It seems perfectly clear that the trial court disagreed with the jury, not concerning disputes in the evidence, nor on the weight of the evidence, but on the question whether Scott's undisputed conduct constituted moral turpitude or was actuated by a sinister motive. The trial court was explicit:

"In the case of Adrian Scott the jury found there was no violation of the morals clause of the contract and no waiver. That brings us back to the question of whether there was or was not a violation of the morals clause. In view of the language of Judge Pope in the Cole case I feel the great weight of the evidence indicates there was a violation of



the morals clause of the Adrian Scott agreement and I so find”

“ . . . I am not so sure in my own mind, on the issue of the violation of the contract, that the court itself may not have been guilty of error. I denied the defendants the right to introduce evidence as to the *motive* for the plaintiffs’ conduct before the Congressional Committee.” (Italics ours.)

“ . . . I know if these men could have denied the charge they would have been happy to have done so; and if they had been men of courage they would not have denied their membership, either past or present, in the Communist Party.” (*Lardner*, Vol. III, pp. 1134-1135.)

In fairness to the learned judge who tried the case below it should be pointed out that the language quoted above was spoken prior to the Supreme Court’s strong admonition in *Slochower*. However the trial court’s sentiments might have seemed before the Supreme Court spoke, it is submitted that the court’s order was erroneous and that the error should now be remedied.

**(b) The Asserted Ground for the New Trial, “To Prevent a Miscarriage of Justice” Fails of Specification and Is Without Support.**

Respondent asserts that the order granting a new trial was made on the further ground that to permit the verdict to stand would be a miscarriage of justice. This ground, if it be a ground at all, was not included among the grounds of respondent’s motion [R. pp. 38-41].

Furthermore, an asserted “miscarriage of justice” is an epithet, not a specification. Unless some error in law

or claimed insufficiency be pointed out, the phrase can only state respondent's displeasure with the verdict, and cannot support a judicial order.

In *Marshals etc. v. Cashman*, 111 F. 2d 140 (C. C. A. 10th, 1940), the trial court had granted a new trial after a jury had returned a verdict for the defendant; on retrial a new jury returned a verdict for the plaintiff. The Tenth Circuit, on review, reversed and instructed the trial court to vacate the order setting aside the first verdict and to reinstate that verdict in favor of the defendant. In discussing the court's action in setting aside the first verdict, the court said:

"The second ground in the motion was mistake and prejudice on the part of the jurors. Mistake and prejudice in what respect? Nothing whatever was set up.

". . . The fourth and last ground was that the verdict was secured by false testimony offered by defendant. What testimony? Coming from what source? Given by what witness or witnesses? False in what respect? The motion was completely silent. The evidence presented conflicts, but they were not extraordinary or substantially different from those frequently present in the trial of commonplace cases. Litigation would become interminable if trial courts shall take it upon themselves to set aside every verdict where the evidence is conflicting.

"It is manifest that on clear considerations the motion was inadequate and defective in essential respects and failed to meet recognized requirements for such a pleading. The granting of it exceeded the exercise of sound judicial discretion; it constituted an abuse of discretion." (111 F. 2d at p. 142.)

Compare *Sachs v. Ohio Nat'l Life Ins. Co.*, 2 F. R. D. 348.

Finally, it should be pointed out that the trial court in granting the motion for new trial did not purport to act on its own initiative, but on the contrary, ordered that "*said motion* for new trial be granted." [R. p. 46.]

In any event, the trial court could not on its own initiative set aside the verdict, after the lapse of ten days from entry of judgment. (F. R. C. P., Rule 59(d); *Marshal's etc. v. Cashman, supra*, at p. 142.) The order granting the new trial was made on April 28; the verdict of the jury was filed February 15, and the original judgment on the verdict was entered on February 28, 1952. (Stipulation to augment record Sept. 17, 1956.)

**(c) The Lardner Opinion Does Not Support the Order for a New Trial.**

Respondent further urges that in its motion for a new trial it relied upon specific errors, and that "certain of these contentions" were held sound in *Lardner*. (Resp. Br. p. 38.) Respondent does not, in this one-sentence declaration nor elsewhere in its brief, assert that any of its specifications upheld in the *Lardner* decision are applicable to Scott's case or that they answer any of appellant's contentions. However, we shall examine the motion for new trial and the holdings in *Lardner* to determine whether any of them can support the order granting a new trial in Scott's case.

This court, in the *Lardner* appeal, specified and considered five points (216 F. 2d 848-849). The first two points related to the jury's determination that Lardner's

employer had waived any breach. Those points are not applicable to this appeal, because the jury determined the waiver issue against plaintiff.

This court in *Lardner* then held, citing *Board of Education v. King*, 82 Cal. App. 2d 857, to the contrary, that the record of Lardner's conviction should have been admitted (*id.* p. 850), and that it was "unnecessary" for the trial court to instruct the jury that Lardner's "offense" involved no moral turpitude. But, in view of the *Slochower* holding, that "no sinister motive" can be imputed to refusal to answer, those holdings must now be re-examined and, it is submitted, cannot now be applied. In any event, this court's discussion in *Lardner* of all questions concerning breach, must be considered as this court intended them to be considered, as *dictum*, in view of the court's holding that "the particular crime of Lardner . . . should be held moral turpitude as a matter of law—not on the bare record of conviction, but on the record of Lardner's actions before the Congressional Committee." It is respectfully submitted that this holding is inconsistent with *Slochower* and should not now be followed.

The only other point discussed in the case was the evidence of the continued use of Lardner's name on motion pictures he had written. This court did not intimate that this admission constituted reversible error. Its statement that this testimony should not be admitted on re-trial was expressly stated to be based upon "this court's ruling on the breach", which, as we have argued, should no longer be held to be the law. In any event, since the re-trial of Lardner was limited to the question of waiver only, even

the caveat concerning that evidence can have no application to Scott's case, because the waiver point was determined in favor of plaintiff.

The respondent's specifications of grounds for the new trial contains no additional point supported on appeal. It should be remembered that the *Lardner* appeal involved the two fundamental questions of waiver and breach. What was said concerning waiver cannot be applicable on Scott's appeal; what was said concerning breach must, it is respectfully submitted, be re-examined in the light of *Slochower* and be governed by the decision of the Supreme Court.

**(d) No Inference Relevant to the Alleged Breach of Contract May Be Drawn as a Matter of Law From Scott's Failure to Answer.**

Respondent, compelled to accept the *Slochower* decision, argues that "all inferences except that of guilt are nevertheless permissible" (Resp. Br. p. 42) and cites a number of California decisions, all before *Slochower*.

Although respondent makes the general statement, it does not suggest any single inference which might have relevance to this appeal, other than the admittedly proscribed inference of guilt. It should also be pointed out that drawing inferences is clearly a fact finding function and the jury has determined the facts concerning breach in favor of plaintiff. No court should undertake, in a jury case, to substitute its inferences of fact in place of a jury's verdict.

A brief survey of the decisions will demonstrate that they are not in point.

*Fross v. Wooton*, 3 Cal. 2d 384, did not involve a refusal to testify before a Congressional Committee nor even a refusal to testify in a criminal proceeding. The case involved recovery of fraudulently concealed assets in a civil proceeding in which the defendant declined to testify. But it is not contended here that Scott declined to testify in the present civil action.

As in *Fross v. Wooton*, *supra*; *Spath v. Seager*, 39 Cal. App. 2d 10, was a civil action; but in that case no one declined to testify. The reviewing court merely said, in passing, that the plaintiff's failure to testify concerning an issue of his good faith was a tacit admission of bad faith (*id.* p. 14). The decision is remote from anything on this appeal.

*In re Berman*, 105 Cal. App. 37, holds contrary to respondent's contention. The court there said: "In other words, where the answer does have the tendency to criminate, it can make no difference what other purpose his silence serves" (*id.* p. 50). *Stillman Pond, Inc. v. Watson*, 115 Cal. App. 2d 440, does not, on careful reading, seem to have any relevance to the contention for which it was cited, other than a reference (at p. 450) that "Mr. Wilhoff did not testify in the hearing before the Commissioner", a fact from which no inference appears in the opinion.

*People v. Richardson*, 74 Cal. App. 2d 528 (erroneously cited as 34 Cal. App. 2d 528), was a criminal prosecution in which the court held that, although no inference of guilt of the offense charged could be drawn by reason of the claim of privilege, an instruction to this effect need not be given if there is evidence of flight from which the

inference of defendant's consciousness of guilt could be drawn (*id.* pp. 534-535).

It should be pointed out that the plaintiff was not asked any question in the case below which he declined to answer. If, in the case below, respondent had asked plaintiff a question which plaintiff had declined to answer, it might be fruitful to examine the pertinent authorities. But the refusal from which respondent seeks to draw inferences took place before a Congressional Committee. It is submitted that the *Slochow* decision is controlling.

### III.

#### **The Trial Court Did Not Purport to Make a Finding of Breach.**

Notwithstanding the prefix to the Findings of Fact and Conclusions of Law, the trial court made it plain that he treated the determination of breach as having been made for him by this court, and he did not independently find on the facts. "Finding" XI specifically says so; and the learned judge on re-trial made it as plain as language could do. [R. 129-130 quoted at App. Op. Br. pp. 40-41.]

Respondent's answers to appellant's contention does no more than to re-state the trial judge's conclusion of law, that is, that the evidence in the present case was the same as that in *Lardner*, and the trial court was bound by "this court's interpretation of similar evidence in the *Lardner* case." (Resp. Br. p. 35.)

We have shown that the evidence was not the same. The contracts were significantly different. And, there is no basis for assuming that the conduct, gesture, intonation, or manner of the two men as witnesses before the Con-

gressional Committee were the same. Even if motive were relevant, it cannot be said their motives were the same as a matter of law. We have also contended that so personal and punitive a determination as moral turpitude requires individual consideration. To impose this court's holding in the *Lardner* appeal to Scott would be as unwarranted as to transfer a finding of guilt in a criminal prosecution from one defendant to another.

But even if the evidence were identical in all respects (which it is not) this could not do away with the requirement for an independently determined finding of fact. (F. R. C. P., Rule 52(a); "A fair compliance with this rule is mandatory", *Smith v. Dental Products Co.*, 168 F. 2d 516; *Cafritz v. Koslow*, 167 F. 2d 749.)

### Conclusion.

Lawyers, trial courts, and intermediate courts of review are not often permitted the luxury of waiting until the Supreme Court has spoken on a difficult problem. In 1947, although there was condemnation of the Un-American Activities Committee from responsible sources (including the motion picture industry itself) Scott and his counsel were compelled to reach a decision without the definitive guidance of the court. The Committee's subpoena would not wait. But Scott's (and his counsel's) prediction of what a court would decide was wrong. Not until several years later was the privilege of the Fifth Amendment made secure in such cases; the effect of the First Amendment as a limitation on the powers of the Committee has not yet been finally decided.

This court, too, had to decide at least two appeals in motion picture contract cases, arising from the 1947



investigation, in advance of guidance from the Supreme Court. The Supreme Court has now indicated, in strong language, a point of view concerning refusal to disclose political affiliation under compulsion. It is a striking commentary on the perception of juries to observe that in each of the contract cases the verdicts have absolved the witnesses of iniquitous motives, exactly as the Supreme Court has now done.

It should be remembered that in 1947, and even during the period of the most intense feelings of the Cold War, scholars and publicists warned against some aspects of this Committee. Two juries, hearing three separate cases, with a fullness, accuracy and detail seldom approached, absolved the witnesses of wrongdoing at least to the extent of enforcing their contract rights.

In the present case, the trial court, acting before *Slochow* and believing himself bound by *Cole*, set aside the jury's verdict. We submit that action was founded on an erroneous conception of the law.

The judgment should be reversed with directions to reinstate the verdict in favor of plaintiff.

Respectfully submitted,

KENNY & COHN, and  
CHARLES J. KATZ,

By MORRIS E. COHN,

*Attorneys for Appellant.*



No. 14985

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, a corporation,

*Appellee.*

---

APPELLANT'S PETITION FOR REHEARING.

---

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FILED

FEB - 1 1957

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No. 14985

IN THE

# United States Court of Appeals

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ADRIAN SCOTT,

*Appellant,*

*vs.*

RKO RADIO PICTURES, a corporation,

*Appellee.*

---

## APPELLANT'S PETITION FOR REHEARING.

---

*To the United States Court of Appeals for the Ninth Circuit:*

Appellant respectfully asks that this court grant a rehearing en banc upon the following grounds:

1. This is a diversity case. In the absence of declared state law or policy, the United States courts have no power, especially as against a jury verdict, to declare conduct to constitute moral turpitude as a matter of law.

2. A challenge to the authority of public officials has never in the history of the United States been held to be vile, depraved, or base conduct. If a change in American traditions is to come about, it should not be imposed by a court as against a jury verdict.

3. It is not a "discredit" to the law to reach a conclusion different from the conclusion reached in an earlier case. Fresh reconsideration and the acknowledgement of change are marks of great stature, and are in the course of the best traditions of the Supreme Court of the United States.

4. On January 21, 1957, the Supreme Court of the United States granted *certiorari* in the decision in *Wilson v. Loew's Inc.*, 142 A. C. A. 191, a decision which had sustained a demurrer against an action founded on the alleged concerted activity of motion picture producers to "blacklist" persons who refused to answer questions before the House Committee on Un-American Activities. This order implements, it is submitted, the change in attitude of the Supreme court evidenced by the *Slochower* decision (350 U. S. 551), and urgently suggests reconsideration of the *Lardner* and *Cole* decisions relied on by this court in its judgment of affirmance.

### Introduction.

Appellant failed in his former briefs to evaluate the significance of the announced principle that refusal to answer the Committee's questions constituted moral turpitude as a matter of law; and failed to present for this court's consideration the consequences of the fact that this case was commenced in the Superior Court of the State of California [R., Vol. I, p. 3], that the case is in the United States courts only by reason of diversity. California courts are extremely reluctant, and have customarily refused, to declare public policy in the absence of a legislative act. The decision of this court that refusal to answer constituted moral turpitude as a matter of law is a declaration of a public concept of morals, and it is sub-



mitted is beyond the power of the United States court in a diversity case.

The decision of the Supreme Court of the United States to grant certiorari in *Wilson v. Loew's, supra*, could not, of course, have been known to anyone prior to January 21, 1957, although appellant has urged that the *Slochower* decision requires overruling *Cole* and *Lardner*. However that may be, in the light of the present stature of the *Wilson* case, this court should reconsider its judgment in the present case.

The remaining point here urged considers the merits of the court's decision. The first, the tradition of *quo warranto* addressed to government by a citizen—is a different aspect of the fundamental argument previously made, that Scott's conduct in peacefully seeking a determination of the Committee's power, though made at his hazard, cannot be against public morals.

The final point here urged comes into the case for the first time with this court's opinion, by reason of the statement that "An opposite result in two companion cases so nearly alike would discredit the law." Consistency in decisions should derive from the internal principle of justice; the search for consistency cannot justify a sameness if the first judgment was erroneous. The growth, adaptability, and standards of American jurisprudence depend on a consistent reshaping of particular decisions to fundamental principles of justice, even if a given result overturns an earlier decision.

We should also point out that the judgment of this court does not notice the principal argument made by appellant, that the *Cole* and *Lardner* decisions are inconsistent with *Slochower* and must be deemed overruled, and that the determination of public morals is a question of fact.

I.

**A United States Court Does Not Have the Power, in a Diversity Case, to Declare Public Morals as Against the Verdict of a Jury.**

No decision of any court of the State of California has been cited, and we have been unable to find any, which holds or even says that contempt of Congress constitutes moral turpitude. No statute or other official declaration of public policy so characterizes a refusal to answer.

The decision of the District Court of Appeal in *County of San Bernardino v. Creamery Co.*, 103 Cal. App. 367, quotes from 6 Cal. Jur. at page 1099 as follows:

“The policy of the state can be ascertained only by reference to the constitution and laws passed under it, or which is the same thing, to the principles underlying and recognized by the constitution and laws. Courts are apt to encroach upon the domain of the law-making branch of the government if they characterize a transaction as invalid because contrary to public policy, unless the transaction contravenes some positive statute or some well established rule of law.” (P. 373.)

See also discussion in

*Maryland Casualty Co. v. Fidelity Co.*, 71 Cal. App. 492 at 497.

Diversity jurisdiction must follow state law and policy. (*Angel v. Bullington*, 330 U. S. 183, 192 (1947).)

“The question, what is the public policy of a State, and what is contrary to it, if inquired into beyond these limits (the Constitution and laws and judicial decisions made known to us) will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range

of judicial duty and functions and upon which men may and will complexionally differ. \* \* \* We disclaim any right to enter upon such examination, beyond what the State Constitutions, and laws, and decisions necessarily bring before us.”

Story, J., in *Vidal v. Girard*, 2 How. 127, 198, 11 L. Ed. 205, 234 (1844).

The *Lardner* decision and the opinion in the present case hold that refusal to answer the Committee’s question constitutes moral turpitude as a matter of law. Such a declaration would seem beyond the powers of a United States court to make; and the fact that it is against a jury’s verdict underscores the point here argued: if a jury of the state’s citizens says, as a matter of fact, that the conduct was not offensive to public morals, does it not appear to be beyond the rightful powers of a United States court to hold the contrary as a matter of law?

Appellant has contended that the determination of public morals is a question of fact (see *Sinclair v. United States*, 279 U. S. 633, and *United States v. Murdock*, 290 U. S. 389, at 397; App. Op. Br. pp. 33 *et seq.*). But even if it be within the powers of the State Legislature to define moral turpitude; and even if in the absence of a legislative declaration, a state court could in such a case hold such conduct to constitute moral turpitude; it would nevertheless appear to be beyond the power of a United States court, particularly in overturning the jury’s verdict, to initiate a state’s public policy in the matter of morals.

The exigencies of a petition for rehearing have not permitted complete development of this point. We submit the point demonstrates the necessity for fuller research and study and for mature deliberation.

## II.

**American Tradition Has Encouraged Private Challenge of Official Authority; to Brand Such an Attempt as Moral Turpitude as a Matter of Law Is Error.**

Submission to excessive authority, without challenge, is in the deepest sense *unAmerican*.

"The doctrine of non-resistance against arbitrary power and oppression, is absurd, slavish and destructive of the good and happiness of mankind" (Art. V, Declaration of Rights, Constitution of Maryland, 1776, American Charters, Constitutions and Organic Laws, Government Printing Office, 1909, p. 1647). From the time of the American colonies, through Samuel Adams ("*On Resistance to Tyranny*"), Henry Thoreau ("*Civil Disobedience*"), the American Quakers, to the present day (Maury Maverick, "*Blood and Ink*"), the best American tradition has encouraged and even ennobled peaceful protest against questioned excesses.

While acquiescence may make life easier for the moment, in the long run the presumed goals of a democracy and the best aims of society are not served by silence. Just government acquires authority not by power but by esteem, and esteem is not won by imprisonment as the price of indignation.

For these reasons, the right to challenge, to test by lawful means, the felt abuses of government have been deservedly held high in the opinion of the American community. True, the challenger must incur the risk of being wrong, and must pay, if he is wrong, for a miscalcu-

lation. But this is not to say that his challenge constitutes immoral conduct or that it is offensive to public conventions.

In any event, it would appear to be a determination which any government agency, including a court, should approach with extreme delicacy, and should, it is submitted, be avoided if a body of the citizenry has determined to the contrary. If the public, as represented by the jury, has found nothing offensive to public morals in Scott's making such a challenge, we respectfully insist that it is error for a court to declare as a matter of law that such a challenge is offensive to public morals.

### III.

#### **The Cole and Lardner Decisions Should Be Recognized as Having Been Overruled by Slochower.**

Overturning precedent, when reconsideration or intervening circumstances require, far from discrediting the law, is its very life. Indeed, the practice of overturning precedent is itself not without precedent, but on the contrary, is amply documented by the greatest tribunal in the history of civilization (see, *e. g.*, *W. Va. State Bd. of Ed. v. Barnette*, 319 U. S. 624; *Pollock v. Farmers' Loan & Tr. Co.*, 157 U. S. 429; *Girouard v. United States*, 328 U. S. 62; *Helvering v. Hallock*, 309 U. S. 106).

We respectfully urge that the *Cole* and *Lardner* decisions were erroneous, and have in any event been overruled by *Slochower*. If the court is persuaded of the foregoing, a frank avowal would be a credit to the administration of justice, not a discredit.

#### IV.

### The Granting of Certiorari in *Wilson v. Loew's*, Supra, Supports a Reconsideration of the Instant Judgment.

It is, of course, too early to predict the ultimate decision in *Wilson v. Loew's*. However, in view of the fact that the case went up on demurrer and dealt with the economic boycott of those who refused to answer the Committee's questions, it is not too much to say that the action of the Supreme Court in granting certiorari is another step in the direction indicated by *Slochower*, and away from the *Cole* and *Lardner* decisions of this court.

#### Conclusion.

The contract cases, of which the present case is one, arose from a wish on the part of the motion picture industry, employers and employees alike, to determine by judicial means whether certain conduct of a Committee of Congress was within its powers. Hundreds, perhaps thousands, have suffered uprooting of their economic lives in the intervening years. Whatever may be said about some of the participants in that ordeal,—employers and employees alike,—the quality of justice to be administered in these cases should not be diluted or stinted one whit. The dignity of the law does not permit lowering by reason of the stature of the accused or the iniquity of the accusation.

The time has now come to say that peaceable challenge, even though mistaken, is not immoral or offensive or contrary to American traditions.

We respectfully request that the petition for hearing be granted.

KENNY & COHN and

CHARLES J. KATZ,

By ROBERT W. KENNY,

*Attorneys for Appellant.*

### Certificate of Counsel.

We are attorneys for the appellant. It is our judgment that this Petition for Rehearing is well founded and not interposed for delay.

ROBERT W. KENNY.

MORRIS E. COHN.





No. 14,993

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

WILLIAM BERRYHILL,

*Appellant,*

VS.

PACIFIC FAR EAST LINE, INC., a Corporation,

*Appellee.*

Appeal from the United States District Court for  
the Northern District of California,  
Southern Division.

BRIEF OF APPELLANT.

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MAY -8 1956

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No. 14,993

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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WILLIAM BERRYHILL,

*Appellant,*

vs.

PACIFIC FAR EAST LINE, INC., a Corporation,

*Appellee.*

Appeal from the United States District Court for  
the Northern District of California,  
Southern Division.

**BRIEF OF APPELLANT.**

---

**STATEMENT OF JURISDICTION.**

The appellant, a marine machinist's helper, sued the appellee in the Superior Court of California, in and for the City and County of San Francisco, to recover damages for personal injuries sustained by appellant when a grinding wheel shattered while he was engaged in his work aboard a vessel owned and operated by the appellee. The appellee removed the action to the United States District Court of the Northern District of California, Southern Division

(Certified File of Record on Appeal), pursuant to Title 28 USCA Section 1332, for diversity of citizenship. Thereafter, appellant filed an amended complaint (Tr. 3) to which the appellee answered (Tr. 8). Appellee's interrogatories (Tr. 15) were answered (Tr. 16). Appellee's motion for judgment on the pleadings (Tr. 20), was granted (Tr. 22, 24), and this appeal was then taken (Tr. 25).

---

#### **JURISDICTION OF THE DISTRICT COURT.**

The jurisdiction of the District Court is granted by the provisions of Title 28 USCA Sec. 1332, which vests jurisdiction in the United States District Courts of all civil actions where the amount in controversy exceeds \$3000 and is between citizens of different states.

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#### **JURISDICTION OF THE COURT OF APPEALS.**

The jurisdiction of this Court is granted by the provisions of Title 28 USCA Sec. 1291, which gives to the Court of Appeals jurisdiction of all appeals from final decrees of District Courts.

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#### **STATEMENT OF THE CASE.**

The facts are disclosed by appellant's amended complaint (Tr. 3-7), and his answers to interrogatories (Tr. 16-20).

On December 20, 1953, the SS. FLYING DRAGON, a sea-going vessel owned and operated by the appellee, was docked for repairs in the County of Alameda, State of California. The repairs were to be made by Todd Shipyards Corporation (hereinafter referred to as Todd), pursuant to a contract entered into between Todd and the appellee. On that day, appellant, who was employed by Todd as a marine machinist's helper, was sent aboard the vessel, together with other Todd employees, to make the contracted for repairs, which were necessary for the ship to continue in the business of carrying cargo. About 10:30 A.M., that day, appellant was assisting one Vincent Solar, a marine machinist in the employ of Todd, to grind the vessel's shaft key way under the contract for repairs. In doing this repair work, Solar used a grinding tool to which was affixed one of several available grinding wheels. The grinding tool itself was furnished by Todd and brought aboard the vessel by Solar; the grinding wheels were on the vessel when appellant and Solar reported aboard for work, having apparently been left there by machinists who worked the preceding work shift.

While Solar was grinding the shaft keyway with appellant assisting, the grinding wheel, affixed to the grinder, exploded and shattered. Fragments of the wheel struck and injured the appellant.

Appellant's complaint (Tr. 3-7), as particularized by his answers to interrogatories (Tr. 16-20), alleges that his injuries were directly and proximately caused by appellee's failure to furnish him with safe

and seaworthy tools with which to perform his work—specifically, the grinding wheel was alleged to be unseaworthy.

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### **SPECIFICATION OF ERRORS.**

Appellant's specification of errors are set forth in his Statement of Points (Tr. 28):

- (1) The Court erred in granting appellee's motion for judgment on the pleadings.
  - (2) The Court erred in holding that the appellant is not one to whom the doctrine of seaworthiness extends.
- 

### **SUMMARY OF ARGUMENT.**

An employee of an independent contractor who performs ship's service aboard ship, with the shipowner's consent or by his arrangement, is protected by the shipowner's traditional warranty of seaworthiness. The warranty of seaworthiness extends to the tools and equipment which are used to service the vessel. The shipowner cannot evade his warranty of seaworthy tools and equipment by arranging to have such tools and equipment furnished by an independent contracting employer of a shoreside worker.



**ARGUMENT.**

In sustaining appellee's motion for judgment on the pleadings, the Court stated that the "extension of the doctrine (unseaworthiness) to a shore side machinist injured while working on a vessel dry-docked for major repairs" (Tr. 23), did not apply.

The Court below did not indicate which factual circumstance was decisive upon the ruling upon the motion for judgment on the pleadings. Consequently it is necessary to consider the component facts in this case in relation to the applicable law.

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**EMPLOYEES OF INDEPENDENT CONTRACTORS WHO WORK IN THE SERVICE OF AND ABOARD A SHIP, WITH THE SHIP-OWNER'S CONSENT OR BY HIS ARRANGEMENT, ARE COVERED BY THE SHIPOWNER'S TRADITIONAL WARRANTY OF SEAWORTHINESS.**

The right of crew members to be furnished a seaworthy vessel, equipment, tools and gear, was extended to cover shore side workers in the landmark case of *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1099 (1946).

In *Sieracki*, a stevedore, an employee of an independent contractor, was injured while loading cargo aboard a ship, when the shackle which supported the boom used in the loading operation, broke at its crown, causing the boom and tackle to fall upon the stevedore. The trial Court found that the shackle had a latent defect and absolved the defendant-shipowner of negligence. The United States Court of Ap-

peals for the Third Circuit reversed and held the shipowner liable for a breach of the warranty of seaworthiness, finding that the shackle used was unseaworthy, 149 F. 2d 98 (1945).

The Supreme Court (328 U.S. at page 95), in affirming the decision of the Court of Appeals, stated:

“On principle we agree with the Court of Appeals that this policy (warranty of seaworthiness) is not confined to seamen who perform the ship’s service under immediate hire to the owner, but extends to those who render it with his consent, or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship’s work or by other devices which would strip the men performing its service of their historic protection.”

In *Sieracki* therefore, the Supreme Court extended the shipowner’s warranty that the vessel, its equipment, tools and gear, is seaworthy, to an employee of an intermediary employer, if such employee performs “portions of the ship’s work” with the shipowner’s “consent or by his arrangement.”

The doctrine of the *Sieracki* case is not limited to longshoremen or stevedores engaged in loading or unloading cargo. It extends to all workers who meet the test established by the Supreme Court. An attempt to limit *Sieracki* to longshoremen and stevedores

engaged in loading and unloading the ship's cargo, was rejected by the Supreme Court in *Pope and Talbott, Inc. v. Hawn*, 346 U.S. 406, 98 L. Ed. 143 (1953).

Hawn, an employee of an independent contractor, was sent aboard the vessel to repair certain equipment used in loading operations. He was to adjust certain feeders used to load the vessel with grain. He was injured by falling into the hold of the vessel through an uncovered hatch. In rejecting the argument that the *Sieracki* doctrine was inapplicable to a repairman employed by an independent contractor, the Supreme Court stated at pages 412 and 413:

“We are asked, however, to distinguish this case from our holding there (the *Sieracki* Case). It is pointed out that *Sieracki* was a ‘stevedore’. Hawn was not. And Hawn was not loading the vessel. On these grounds, we are asked to deny Hawn the protection we held the law gave *Sieracki*. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. *Sieracki*’s legal protection was not based on the name ‘stevedore’ but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same

danger. All were entitled to like treatment under the law.”

*Sieracki* and *Hawn* were recently applied to a shoreside worker whose duties were analogous to the work performed by the instant appellant. In *Torres v. The Kastor, et al.*, 227 F. 2d 664 (C.A. 2, 1955), Torres, an employee of an independent contractor, was injured while working aboard the vessel pursuant to a contract of repairs between his employer and the vessel owner. Torres sued the shipowner whose contract with libelant's employer required the latter to clean the vessel of debris which followed the transportation of a cargo of loose pitch, and to make the vessel ready for general cargo. While cleaning the vessel, libelant's eyes were injured by the vessel owner's failure to supply libelant with a seaworthy place to work. In affirming judgment for libelant, the Court recognized that the vessel owner's duty to provide a safe place to work and a seaworthy vessel are “obligations now reaching to shoreworkers making repairs on a vessel” (*Torres v. The Kastor, et al.*, *supra*, at page 665).

Appellant herein was a marine machinist's helper, performing repairs aboard appellee's vessel. He was “actually working in the vessel in the repair of its shaft keyway and was rendering services necessary in the ship's business of carrying cargo” (Tr. 4, Complaint, paragraph IV). Appellant's work, like the work of *Hawn* and *Torres*, both *supra*, was a necessary step to make the vessel ready in all its parts and

appurtenances, for the stowage and transportation of cargo. Like *Hawn* and *Torres*, appellant, while so engaged in ship's work, was entitled to be furnished with a safe and seaworthy vessel, equipment, tools and gear.

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**THE SHIPOWNER'S WARRANTY OF SEAWORTHINESS INCLUDES TOOLS AND APPLIANCES USED IN THE PERFORMANCE OF SHIP'S SERVICE.**

It is well established that tools and appliances used aboard a ship in its service are warranted seaworthy by the shipowner. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 88 L.Ed 561 (1944).

In the instant case, the unseaworthy appliance was a grinding wheel. It was being used to repair and maintain the vessel and to make her ready to sail. There can be no question that if a seaman on ship's articles, while working in the machine shop, which is part of the engine room aboard a vessel, had been injured while using a defective grinder and wheel aboard ship, he would be entitled to indemnity for his injuries. Since appellant was engaged in the repair of ship's gear he is entitled to the same warranty of seaworthiness of appliances, applicable to a seaman.

THE SHIPOWNER CANNOT ESCAPE HIS OBLIGATION TO FURNISH SEAWORTHY TOOLS TO SHORESIDE WORKERS MERELY BY ARRANGING TO HAVE SUCH TOOLS FURNISHED BY THE INDEPENDENT CONTRACTING EMPLOYER OF THE SHORESIDE WORKERS.

It is well settled that a shipowner cannot escape his warranty of seaworthiness by having equipment and gear necessary to perform the ship's service, supplied by an independent contractor.

In *Petterson v. Alaska Steamship Company*, 205 F2d 478, (CA-9, 1953), this Court held that the defendant shipowner was responsible for the unseaworthiness of equipment brought aboard its vessel by the independent contractor in furtherance of the ship's work to be performed by the contractor. In *Petterson*, a stevedore was injured when a snatch block which was brought aboard by his employer, broke. The District Court denied recovery because it was not shown that the block belonged to the ship nor that it was part of its equipment. Plaintiff contended that liability should be imposed, even though the equipment belonged to his employer and was not part of the ship's equipment. The trial Court rejected this contention, on the ground that the *Sieracki* case did not go so far, even though the Court found that the block was used in a "customary and usual manner" in that it was "of a type ordinarily customarily used and proper for the use to which it was put upon the location in question." This Court accepted the trial Court's finding of fact regarding the condition and use of the block, but nevertheless held that since the block would not have broken unless it was defective, it was,

herefore, unseaworthy. It reversed the trial Court with instructions for further proceedings for a determination of damages. Upon application of Alaska Steamship Company, the Supreme Court granted certiorari, and in a per curiam opinion, *Alaska Steamship Company v. Petterson*, 347 U.S. 396, 74 S.Ct. 601 (1954), affirmed the decision of this Court, citing as authority the *Sieracki* and *Hawn* cases. The significance of this decision and its applicability to the instant case is underscored by the dissent of Mr. Justice Burton with which Mr. Justice Frankfurter and Mr. Justice Jackson joined. The dissent conceded that the effect of the action by the majority was to require the shipowner to warrant the seaworthiness of equipment owned and used aboard the ship by the independent contractor in furtherance of the contracted work.

The latest case in the Supreme Court, *Rogers v. U. S. Lines Co.*, 347 U.S. 984, 74 S.Ct. 849 (1954), reaffirmed the principles of law beginning with *Sieracki*. The Court dispelled any doubt as to the implication of *Petterson*, by holding that the doctrine of seaworthiness extends to equipment used in the service of the vessel no matter by whom furnished.

Rogers was a stevedore employed by an independent contractor who was sent aboard one of the defendant's vessels to assist in loading cargo. His employer, the independent contractor, furnished a runner to be used on one of the vessel's winches for unloading purposes. This runner was defective and caused Rogers to be injured. The Court of Appeals for the Third Circuit,

denied plaintiff recovery, as the evidence indicated that the unseaworthy runner was not furnished by the shipowner but rather by the independent contractor, 205 F2d 57 (CA-3, 1954). The Supreme Court in granting certiorari, underscored the effect of its decision in the *Petterson* case by its brevity in deciding as follows:

“June 1, 1954. Per Curiam. The petition for writ of certiorari granted and the judgment is reversed.”

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**CONCLUSION.**

The order below should be reversed.

Dated, San Francisco, California,

May 9, 1956.

Respectfully submitted,

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*Attorneys for Appellant.*



No. 14,993

In the  
United States Court of Appeals  
*For the Ninth Circuit*

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WILLIAM BERRYHILL,

*Appellant,*

vs.

PACIFIC FAR EAST LINE, INC., a corporation,

*Appellee.*

---

**Brief for Appellee**

Appeal From the United States District Court for the  
Northern District of California, Southern Division

---

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FILED

JUN 11 1956

PAUL P. O'BRIEN, CLERK



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**Brief for Appellee**

Appeal From the United States District Court for the  
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---

**FACTS**

Appellant, William Berryhill, a marine machinist, was employed by Todd Shipyards Corporation. Appellee, Pacific Far East Line, as operator of the steamship FLYING DRAGON, contracted with Todd to accomplish certain major repairs on the FLYING DRAGON, and for this purpose delivered the vessel to Todd's shipyard, Alameda, California, where it was placed in drydock. Todd sent three of its night-shift employees, including appellant on board the vessel, where they commenced work with a portable grinder and grinding wheel. Both were owned and furnished by Todd. While appellant was grinding on the vessel's main shaft pursuant

to Todd's instructions, the grinding wheel, for reasons unknown, suddenly flew apart, injuring appellant.

As specifically set forth in his Brief (pages 3-4), appellant claims damages solely on the theory that appellee as operator of the vessel must be held to have warranted the seaworthiness of the grinding wheel.

Appellant did not allege that appellee *negligently* failed to provide him a safe place to work or with safe tools. In fact, there is no suggestion that appellee could have prevented this injury. Appellant's theory of recovery hangs entirely on the premise that the shipowner warrants the seaworthiness of tools belonging to and used by a drydock owner to make major repairs, acting as an independent contractor, on the shipowner's vessel while in drydock at the drydock owner's yard.

### SUMMARY OF ARGUMENT

Appellant as a shoreside machinist performing major repair work on a vessel in drydock cannot avail himself of the seaman's right to seaworthy tools because he is neither doing seaman's work nor undergoing a seaman's hazard. A shoreside repairman is a business invitee who may recover only on proof of negligence. In any event his own specialized repair tools, not being appurtenances of the vessel, are not covered by the doctrine of unseaworthiness.

### ARGUMENT

#### **The Doctrine of Shipowners' Liability for Unseaworthiness Does Not Apply to a Shoreside Machinist Assisting in Major Repairs on a Vessel in Drydock.**

Appellee does not contest the general proposition of appellant that the shipowner's warranty of seaworthiness covers shoreside employees who perform work historically

that of a seaman. In *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 99 (1946), the Supreme Court held that stevedores are entitled to such warranty. The court said:

“Historically the work of loading and unloading is the work of the ship’s service, performed until recent times by members of the crew (citing cases).” *Sieracki* at page 96.

“\* \* \* (The stevedore) is, in short, a seaman because he is doing a seaman’s work and incurring a seaman’s hazards.” *Sieracki* at page 99.

Appellant here is not a seaman because he was not doing seaman’s work. On the contrary, he was assisting in the performance of major repair work on the ship’s propeller shaft; work that could be done only in drydock and with use of the drydock owner’s tools and methods, and pursuant to drydock supervision and instructions. In short, it was a shipyard job involving facilities not available on shipboard, and training far beyond that which a seaman has or ever did have. This work bears no resemblance, historical or otherwise, to the seaman’s labors; nor is there any similarity in the hazards connected with minor repairs sometimes made by a seaman to those connected with “machine shop” work which appellant was performing.

The *Sieracki* case (*supra*) on which appellant places his principal reliance is grounded on the principle that since the stevedore does what formerly was the seaman’s work, he should share the seaman’s right to a seaworthy vessel and seaworthy appliances.

A vessel drydocked for repairs is withdrawn from commerce and, often her crew will be largely paid off, having only a skeleton crew for security reasons while specialists such as appellant take over. This is as true historically as it

is today. Vessels have always needed the continuing attention of their builders or ship repair yards having specially trained men and special equipment, to maintain them in a condition fit to carry cargo. Only when repairs are completed and the vessel again waterborne, can the seaman or the stevedore commence his work of loading, stowing, etc. intimately connected with the handling of cargo and the earning of freight money.

From the standpoint of function, a wide gulf separates the appellant here from the seaman and his present day in part substitute, the longshoreman.

Nor can it be said that we are confronted here with anything resembling an exposure to the hazards connected with an ordinary seaman's work. Appellant was working on board a vessel on land. Nothing attached to or used by the vessel caused his injury. The grinding wheel came from ashore and would be returned ashore when the job was completed. The only factual premise for appellant's cause of action presented to the court below or here is a geographical coincidence; that his grinding wheel happened to come apart in the shaft alley of appellee's vessel instead of ashore in his employer's machine shop.

Nothing in the language of *Sieracki* indicates an intention or suggests a reason to extend the scope of the doctrine of liability without fault to one so far removed from the hazards of a seaman's work as this appellant.

#### **Pope and Talbot v. Hawn Does Not Hold Otherwise.**

It is asserted by appellant that the Supreme Court in the recent case of *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), indicated an intention to extend the doctrine of the *Sieracki* case to all "repairmen".



Examination of the facts set forth by the Court of Appeals (CA-3 1952), 198 Fed. 2d 800 at 803, shows that Hawn was not a "ship repairman". Instead he was a ship's carpenter foreman employed to adjust the grain feeder boxes on board the Pope and Talbot vessel. These boxes are used in the bulk loading of grain. Actually, Hawn was performing the same functions pertaining to loading the vessel with grain that formerly a seaman and now stevedores ordinarily perform with other types of cargo.

The fact that Hawn was doing work quite similar to that of a stevedore and had a direct relation to the loading and handling of cargo in preparing the ship for her voyage was mentioned by each court that considered his case, and emphasized as the compelling reason for extending to him the warranty of seaworthiness.

The opinion of the District Court states:

"Plaintiff was an employee of Haenn Ship Ceiling and Refitting Corporation, which had been engaged to prepare the ship to receive a cargo of grain by altering the grain feeders and erecting shifting boards \* \* \*. The doctrine of seaworthiness applies to the plaintiff, whose duties had a direct relation to the proper loading and handling of the ship's cargo in preparation for a voyage." 99 Fed. Supp. 226 at 228-229 (E.D. Penna. 1951).

The Court of Appeals for the Third Circuit, in affirming, commented:

"Hawn was admittedly \* \* \* actually working in the ship, preparing it to receive a cargo requiring special provision for its storage, and was therefore rendering services necessary in the performance of the ship's business of carrying cargo. The difference between Hawn and the longshoreman in *Seas Shipping Co. v. Sieracki* is, at most, one of slight degree." 198 Fed. 2d, 800, 803 (CA-3, 1952)

Finally, the Supreme Court in reciting the facts in comparison with those of the *Sieracki* case stated:

"Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain-loading equipment developed a *slight* defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on the voyage. All were entitled to like treatment under the law." 346 U.S. 406 at pages 412-413 (1953)

Nothing in this language, or elsewhere in the court's opinion, indicates a disposition to lay down any general rule as to repairmen. On the contrary the court's opinion warns against such construction of its holding. The character of the work is emphasized as the controlling factor, regardless of characterization of the worker. Coupled with this is the reference to the "slight" defect which Hawn was engaged in repairing, "so that the loading could go on at once" indicating the close relationship of the work to the actual operation of the ship was important, and emphasizing the fact that the repairs were slight in comparison to other repairs which might be described as major repairs, as in our case. It is plain that Hawn received the benefits of the warranty of seaworthiness solely because, like *Sieracki*, he was doing a seaman's work in substantially the same category as loading cargo and as a consequence was exposed to the seaman's maritime risk.

The remaining case cited by appellant, *Torres v. The Kastor*, 227 Fed. 2nd 664 (CA-2 1955), discussed the status

of a ship cleaner employed to sweep up the residue of a cargo of pitch and make the vessel ready again for general cargo. Nothing in the court's brief opinion or appellant's argument suggests that Torres was in the same category as one engaged in the major repair of the vessel itself. Cleaning a vessel's holds to receive new cargo has been and still is in many cases a seaman's work. This is common knowledge. For that reason Torres was entitled to a seaworthy vessel. Hold cleaning is not repair work. Therefore the court's description of the workers as repairmen is completely erroneous and evidently a careless misstatement.

Neither the facts set forth in appellant's pleadings nor the authorities discussed in his brief suffice to establish him as one who does seaman's work or is exposed to a seaman's hazards. It follows that appellant, as a drydock repairman, is in no way entitled to the status of a seaman or the seaman's warranty of seaworthiness.

We have already seen that appellant was a shoreside repairman working for a shipyard doing major repairs to a vessel, which brings us to the point of discussing what his rights are under the law.

**Appellant Was a Business Invitee and as Such Entitled to Recover from the Shipowner if He Suffered Injuries Because of Negligence on the Part of Such Person. He Is Not However Entitled to the Warranty of a Seaworthy Vessel.**

Berryhill is, of course, under the Longshoreman's and Harbor Worker's Compensation Act, 33 USC, Section 901 et seq. entitled to recover compensation and obtain hospitalization and medical service from his employer, Todds Drydock. As indicated, he is also entitled as a business invitee to recover from the shipowner if injured because of the latter's negligence, and as such his position is superior to

that of a worker who is injured on shore, in that contributory negligence of a business invitee on board vessel merely goes to mitigation of damages.

He is not, however, entitled to the warranty of a seaworthy vessel, and we have demonstrated that the cases cited by appellant fail to show that he is in the category of a seaman and entitled to such warranty. There are in fact several cases which indicate the contrary.

A case in point is *Petersen v. United States*, 80 Fed. Supp. 84 (E.D. NY 1947). Respondent's vessel was in a drydock for extensive repairs and alterations. Petersen, a repairman employed by the shipyard, was injured when a ship's chain broke in the course of the work. The court held:

"Since libelant was not a member of the crew, or a stevedore engaged in loading cargo, but an employee of a contractor repairman, he was not entitled to a seaworthy ship on which to work. \* \* \* Employees of a contractor remain 'business guests' and are not entitled to a seaworthy ship under the doctrine of *The Osceola*, 189 U.S. 158." (Page 88)

Again in *Meyers v. Pittsburgh Steamship Company*, 165 Fed. 2d, 642 (CCA-3 1948), a shipyard rigger was injured by a fall on ice created by the discharge of water from the defendant's vessel as it lay in drydock. The court declined to invoke the warranty of seaworthiness on plaintiff's behalf.

To the same effect are the holdings in *Guerrini v. United States*, 167 Fed. 2d 352 (CCA-2 1948), dealing with the status of a ship's boiler-cleaning man, and *Martini v. United States*, 192 Fed. 2d 649 (CA-2 1951), holding that the general superintendent of a shoreside repair company was owed no duty of seaworthiness.

The reason for the distinction between the seaman and the shoreside repairman is aptly stated in *Manera v. United States*, 124 Fed. Supp. 226 (E.D. NY 1954). Manera was employed by a subcontractor to clean certain tanks aboard respondent's vessel, which was in a shipyard for repair of bottom damage caused by grounding on a rock. He was injured allegedly because one of the ship's ladders was unseaworthy. While the court found that the ladder was not defective, it declared that Manera was not entitled to the warranty of seaworthiness:

"Since he was not a seaman and was not exposed to the peril of descending from the 'tween deck into the lower hold while the ship was rolling or pitching on the high seas, the test to be applied was that of what a business guest would be entitled to exact from the ship while in the performance of such a task as he was engaged in while the ship was lying at this repair yard dock. It is believed that the foregoing is a correct statement in view of all that was written in *Pope and Talbot v. Hawn*, 346 U.S. 406." (Page 227).

If, as the above cases hold, the shipowner does not warrant the seaworthiness of his own property for the protection of all business invitees or guests, it follows that he should not be held to warrant the seaworthiness of property owned and controlled by third parties.

**In Any Event, the Shipowner's Warranty of Seaworthiness Pertains Only to "The Proper Appliances Appurtenant to the Ship".**

Even if the court should conclude that appellant does come within the class of workers entitled to the warranty of a seaworthy vessel, it does not follow that the grinding wheel being used by appellant at the time of the accident is one of the class of tools warranted seaworthy.

The classic definition of the doctrine of seaworthiness is set forth in *The Osceola*, 189 U.S. 158, 175 (1903) :

“\* \* \* The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of a ship or the failure to supply and keep in order the proper appliances appurtenant to the ship.” (Page 175).

An appurtenance of the ship is something “pertaining to or belonging to the ship in the legal sense,” Webster’s Collegiate Dictionary, Fifth Ed. page 53.

Appellant is, under the law, required to plead and prove facts showing the grinding wheel should be treated as an appurtenance of the vessel when not owned or furnished by the vessel. The case of *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478 (CCA 9th, 1953), affirmed 347 U.S. 396 (1954), does not hold otherwise. This court carefully pointed out that in that case that the unseaworthy block which injured Petterson was a “type of equipment commonly found as a part of the gear of both ship and stevedoring firms” (p.479) and should therefore be considered equipment of the vessel. Here we are dealing with a repair tool used by a drydock machinist for the specialized task of grinding the vessel’s main shaft keyway. In the circumstances it must be taken that such a tool was not one which “pertained to or belonged to the ship in the legal sense.” Appellant admitted in answer to an interrogatory that he has no facts to prove that the grinding wheel was an appurtenance of appellee’s vessel.

(Interrogatory)

“2. Was the grinder and grinding wheel a part of the equipment and/or appurtenances of the steamship Flying Dragon?

(Answer)

"As to the grinding wheel, plaintiff does not know if it was a part of the equipment and/or appurtenances of the steamship Flying Dragon. As to the grinder, no." (Tr. 17, Plaintiff's Answer to Defendant's Interrogatory 2.)

The mere fact that appellant's grinding wheel was required for the work in progress does not make it an appurtenance of the vessel.

In point is the recent case of *Fredericks v. American Export Lines*, 227 Fed. 2d 450 (CA-2 1955). Plaintiff, Fredericks, asserted that the vessel warranted the seaworthiness of a cargo skid affixed to a stevedore-owned shore structure because the skid was necessary to transfer cargo from the upper story of the pier to the vessel. The court answered this argument by stating:

"Tools or equipment do not become part of a lessee's [the shipowner's] plant merely because such tools or equipment are indispensable to the work that an independent contractor has agreed to perform." (Page 454)

Similarly, the drydock which supported appellee's vessel was equally necessary to the work, but it could hardly be argued that the drydock was warranted to be seaworthy as an appurtenance of the vessel. By the same reasoning, no warranty of seaworthiness should attach to the specialized tools of the drydock owner which he furnishes for use by his workmen aboard the vessel. While there may be logic in holding that the shipowner warrants the adequacy of the nautical blocks and tackle used in the typically maritime task of loading the vessel as in the case of *Petterson*, this logic disappears when applied to the myriad tools and devices which the drydock owner may have at his disposal,

and which the shipowner does not ordinarily have in the operation of his vessel.

For the above reasons, regardless of appellant's status, the *Petterson* decision should not be extended to force this appellee and those in like circumstances to warrant the specialized tools of the drydock machinist, even if it be admitted for the sake of the point that appellant is in the category of a seaman.

### CONCLUSION

For the reasons shown, the judgment of the court below should be affirmed.

Dated at San Francisco, California, June 8, 1956.

Respectfully submitted,

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No. 14,993

IN THE

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VS.

PACIFIC FAR EAST LINE, INC.,  
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*Appellant,*

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**Appeal from the United States District Court for  
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**REPLY BRIEF OF APPELLANT.**

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**FILED**

**JUL -2 1956**

**PAUL P. O'BRIEN, CLERK**



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**THE WARRANTY OF SEAWORTHINESS  
APPLIES TO SHIP REPAIRMEN.**

The shipowner's warranty of seaworthiness extends to all who work in the service of and aboard a vessel with the shipowner's consent or by his arrangement. This is true, regardless of the job classification of the particular worker, or the nature of his work. Appellee suggests that only repairmen who perform "minor" repairs in connection with the loading operation of the vessel are entitled to the warranty of

seaworthiness. Cases cited by appellee do not warrant the making of any such distinction.

The pleadings before the Court, the interrogatories propounded by appellee and answered by appellant, will be searched in vain for any evidence that the work performed in this case was either a "major" or "minor" job. Even assuming, *arguendo*, that the instant repairs could be described as a "major" repair, such a repair is as important to the vessel's business of carrying cargo and for the security of life at sea as are "minor" repairs.

*Read v. United States*, 201 F. 2d 758 (CA-3, 1953), was an action in admiralty against a vessel owner for damages for personal injuries sustained by an employee of an independent repair contractor. The respondent vessel owner in the *Read* case contracted for the conversion of a merchant vessel to a troop carrier. The independent contractor was to perform the necessary repair and conversion tasks. Under the agreement, the contractor was obligated to provide suitable lighting for the work. Libelant, who was employed by the independent contractor as a ship repairman, and in the course of his work of converting salt water ballast tanks into fresh water ballast tanks was injured when he fell into a hold as a result of insufficient lighting in the work area.

In concluding that the shipowner had breached its nondelegable warranty of seaworthiness, the Court stated at page 761:

"In our view, it is unnecessary to discuss the issue of negligence on the part of the vessel

because, irrespective of that issue liability may be predicated on the ground of unseaworthiness. It has been settled law since *The Osceola*, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, 'That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.' 189 U.S. at page 175, 23 S.Ct. at page 487 (emphasis supplied). *Carlisle Packing Co. v. Sandanger*, 1922, 259 U.S. 255, 259, 42 S.Ct. 475, 66 L.Ed. 927; *The Arizona v. Anelich*, 1936, 298 U.S. 110, 56 S.Ct. 707, 80 L.Ed. 1075; *Mahnich v. Southern S. S. Co.*, 1944, 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561. In *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, at page 94, 66 S.Ct. 872, at page 877, 90 L.Ed. 1099, it was held that the warranty of seaworthiness '... is essentially a species of liability without fault ... and such liability "... is neither limited by conceptions of negligence nor contractual in nature. ... It is a form of absolute duty owing to all within the range of its humanitarian policy.'"

"The *Sieracki* case also specifically stated that the vessel's obligation of seaworthiness extends to stevedores while working aboard the ship. In *Hawn v. Pope & Talbot, Inc.*, 3 Cir., 1952, 198 F. 2d 800, we held that the vessel's liability for unseaworthiness extended to a carpenter employed by one having a contract to repair the ship—as in the instant case."

**WHETHER OR NOT A TOOL OR APPLIANCE IS ONE WHICH IS APPURTENANT TO A SHIP IS A FACTUAL QUESTION.**

The grinder and grinding wheel used by appellant was of a type commonly furnished vessels by ship chandlers. A merchant vessel is a complex mechanical object requiring specialized tools, including grinders and grinding wheels, to maintain, manage, repair and operate. Such tools and equipment used by employees of independent contractors engaged in performing work for and on the vessel are warranted seaworthy by the vessel owner, regardless of the fact that they were furnished in the first instance by the independent contracting employer. *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478 (CA-9, 1953), affirmed, 347 U.S. 396 (1954). The case of *Fredericks v. American Export Lines*, 227 F. 2d 450 (CA-2, 1955), cited by appellee in its brief, involved an injury to a longshoreman, who was hurt while standing on a pier as a result of the failure of a defective appliance *located on the pier* and furnished by his employer, an independent contractor. No evidence was presented at the trial to show that the appliance itself was of a type customarily found and used aboard ships so as to be considered appurtenant thereto.

Appellee urges that appellant's answer to appellee's interrogatory No. 2 (Tr. 17) was an admission that grinders and grinding wheels are not equipment customarily appurtenant to a vessel. That is not true. The only inference to be drawn by the answer to the interrogatory is, that the particular grinder involved was not directly furnished by the shipowner. At the



time of trial, appellant will establish that the defective equipment used by appellant in performing his work in the service of the vessel, and at the vessel owner's request, was of the type ordinarily and customarily found aboard vessels and used for purposes similar to that performed by appellant at the time he was injured.

Dated, San Francisco, California,

July 2, 1956.

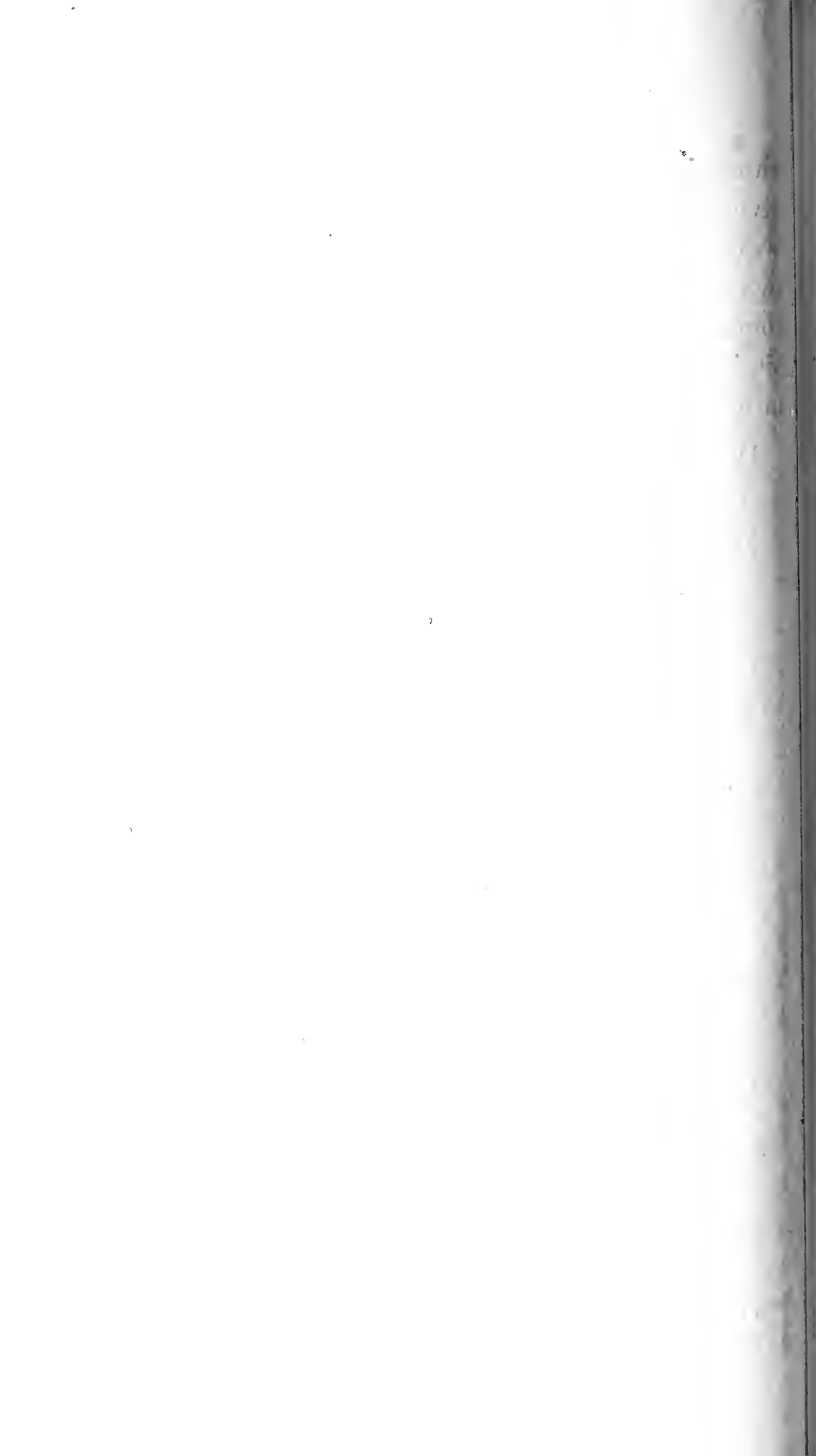
Respectfully submitted,

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No. 14,993

IN THE

United States Court of Appeals  
For the Ninth Circuit

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WILLIAM BERRYHILL,

*Appellant,*

VS.

PACIFIC FAR EAST LINE, INC.,  
a Corporation,

*Appellee.*

Appeal from the United States District Court for  
the Northern District of California,  
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

---

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FILED

FEB 8 1957

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No. 14,993

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*Appellant,*

vs.

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*Appellee.*

**Appeal from the United States District Court for  
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Southern Division.**

**APPELLANT'S PETITION FOR A REHEARING.**

---

*To the Honorable William Denman, Chief Judge, and  
to the Honorable Associate Judges of the United  
States Court of Appeals for the Ninth Circuit:*

Petitioner, the appellant above named, petitions for a rehearing of the above-entitled cause, and in support thereof alleges:

**INTRODUCTION.**

The opinion of the Court in this case is not only inconsistent with the decisions of like and related cases decided by the Supreme Court, but also clashes

with decisions of similar cases in other Circuit and District Courts.

This Court's affirmance of the judgment on the pleadings is an effective denial of a valuable right to which appellant is entitled. To remedy this injustice, the case should be reheard. Because of its broader implications the rehearing should be en banc, so that the circuit judges may consider the validity of appellant's contentions.

The facts although fully stated in appellant's brief, are restated, to emphasize the discussion of the applicable law.

On December 20, 1953, the SS FLYING DRAGON, a sea-going vessel owned and operated by the appellee, was docked for repairs at Todd Shipyards Corporation (hereinafter referred to as Todd), pursuant to a contract between Todd and the appellee. On that day, appellant, a marine machinest's helper, and others employed by Todd went aboard the vessel to make the necessary repairs to enable the ship to continue in the business of cargo carriage. Appellant was assisting a marine machinist to grind the vessel's "shaft keyway". In doing this repair work, the machinist used a grinding tool to which was affixed one of several available grinding wheels. The grinding tool itself was furnished by Todd and brought aboard the vessel by the machinist; the grinding wheels were on the vessel when appellant and the machinist reported aboard for work, having apparently been left there by machinists who worked the preceding work shift.



While the two men were grinding the shaft keyway the grinding wheel, affixed to the grinder, exploded and shattered. Fragments of the wheel struck and injured the appellant.

Appellant's complaint, as particularized by his answers to interrogatories propounded by appellee, alleges that his injuries were directly and proximately caused by appellee's failure to furnish him with safe and seaworthy tools with which to perform his work—specifically that the grinding wheel was unseaworthy. (Tr. 3-7, 16-20.)

Appellant, although employed by a shoreside ship repair yard is a marine machinist. At the time of his injury, we contend he was doing "ship's work", within the ambit of precedent judicial acceptance of the meaning of this phrase.

The Supreme Court decisions of the *Sieracki*, the *Hawn*, the *Petterson*, and the *Rogers* cases have already been reviewed in earlier briefs. Appellant has apparently failed to convince the Court that they do apply. Other cases (repairs of vessels while in dry dock) and specifically to the point of the instant case, will be reviewed below.

This Court found, as a fact, that appellant seeks redress for his injuries, sustained during repairs to the "shaft keyway" of the vessel, "when a grinding wheel, owned and furnished by appellant's employer, Todd Shipyards Corporation, shattered or disintegrated while the SS FLYING DRAGON, owned by appellee was docked for repairs." (238 F.2d 385.)

The "shaft keyway" is a device to keep the ship's propeller from turning on the shaft. Sometimes also referred to as a "shaft tunnel or shaft alley", it is a watertight passage housing the propeller shafting from the engine room to the bulkhead at which the stern cube commences; it provides access to the shafting and bearings and also prevents any damage to it from cargo in the space through which it passes. The "shaft keyway" which is used to connect the propeller of the shaft, consists of longitudinal grooves cut into the shaft itself, and also into the propeller. The key itself is shaped like a half moon and fits into the groove on the shaft and the upper part of the key fits into the groove in the propeller, thus preventing the propeller from rotating freely on the shaft. It connects with the shaft tunnel or shaft alley.

In considering this petition, the Court may find it helpful to requisition of the parties some visual demonstration of the shaft keyway, in which event both sides can agree to furnish the Court with the builder's block diagram, drawings, blueprint, or perhaps a photograph of the device involved herein. It will thus be apparent that the appellant, when injured by the exploding grinding wheel was doing the simplest kind of "ship's work" as defined by the Supreme Court in *Sieracki*, and all subsequent cases decided by the federal Courts at all levels, throughout the Circuits.

Longshoremen, ship cleaners, and shipyard repairmen have already been afforded the *Sieracki* doctrine rights. No basic distinction has ever been made, particularly in the Supreme Court, that the repair work

which is involved is small or great. The principle of law involved is that this type of work would normally or historically have fallen to the lot of the seaman. In the old days, the seaman used to sew the sails and clean the hulls and do everything on board the ship that was necessary.

Before the era of "increasing commerce and the demand for rapidity and special skill" (*Atlantic Transport Co. v. Imbrovek, supra*, 234 U.S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work was performed by the ship's crew. The traditional protections afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and were equally applicable whether the ship was at sea or in port. Upon proper performance of the work, whether navigational or non-navigational in character, depended in large measure the safe carrying of passengers and cargo and the safety of the ship itself. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending to these non-navigational phases of the vessel's enterprise. This included contracts made with shipyards for all types of repairs aboard the vessel. In so doing the shipowner did not relieve himself of his traditional obliga-

tions, for these men, though not members of the crew, were doing precisely the work of the crew, as necessary to the accomplishment of the ship's enterprise as navigation itself. Rightly these men looked to the vessel for the safe accomplishment of their work.

In these modern days, breakdowns at sea and even in port are not at all unusual. The licensed engineers and others in the engine room of a vessel, repair whatever has to be done in the vessel, even to the point of making a major repair in the engine room, to the largest as well as the smallest structures on board. In other words, everything on board the ship historically was always taken care of by the seaman, so far as repairs are concerned. The shipyard, with respect to the work which engine room craftsmen perform—a machinist in the instant case—is just as much an innovation, as the growth of longshore and stevedoring activities, and the development of those categories of specialized labor with which *Sieracki*, *Hawn*, *Petterson* and *Rogers* were concerned.

The triad of Supreme Court cases, *supra*, since *Sieracki*, in principle, entitles the appellant to maritime" rights spelled out in those cases for personnel other than seafaring men. Moreover, Courts of Appeal and District Courts, interpreting these cases, have conferred rights which appellant here seeks, to shore-side workers, on vessels, in dry dock, at a shipyard (as here), doing the kind of "ship's work" which appellant was doing when he was hurt.

Indeed the United States in at least one case (*infra*), which has come to our attention, conceded in

a brief recently filed with the Supreme Court that an electrician employed by a ship repair company who was injured while the vessel was "high and dry in a shipyard for purposes of improvement and overhaul, \* \* \* is of course entitled to a *seaworthy* ship \* \* \*" (Emphasis supplied.)

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**THE OPINION OF THE COURT WHICH DECIDED THIS CASE, CONFLICTS WITH SUPREME COURT DECISIONS IN THIS FIELD, AS WELL AS WITH RECENT DISPOSITIONS OF COURTS IN OTHER CIRCUITS.**

*Lester v. United States*, No. 373, United States Supreme Court, October 1956 Term, is four square with the instant case. Certiorari was granted on November 5, 1956, to review the remand by the Court of Appeals (234 F. 2d 625, C.C.A. 2, 1956), which directed the District Court to dismiss the libel. Lester, a shoreside electrician, employed by a ship repair yard, was injured during the course of his work, while the vessel was "high and dry in the No. 2 dry dock of Marine Basin Co." on which day the vessel, owned by the United States "was undergoing a *general overhaul* by Marine Basin". (234 F. 2d 625-626.)<sup>1</sup> (Emphasis supplied.) The District Court for the Eastern District of New York (127 F. Supp. 413), found for libelant on the unseaworthiness statement of claim but denied relief on the negligence count. The Court of Appeals (pp. 627-628) refused to adopt the District Court's rationale which led it to find unseaworthiness. Had the Court of Appeals been of the

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<sup>1</sup>The analogy to our case is obvious.

opinion that the warranty of seaworthiness did not apply in the *Lester* case, it would certainly have said so, as an additional reason for reversing the trial judge.

The Court did in fact consider the issue of unseaworthiness, raised by the pleadings and found that it applied. It found, however, on the facts, that the vessel was not unseaworthy, stating at page 627:

“Since we hold on the basis of the undisputed facts and the facts found by the trial court, that the Q-100 was not unseaworthy, it will be unnecessary for us to consider the questions raised relating to damages and indemnification.”

The Government in opposing certiorari, did not oppose it on the ground that the warranty of unseaworthiness does not apply in such a situation. It was of the view, as was the Court of Appeals, that the doctrine of seaworthiness was applicable. In the brief of the United States in opposition to the petition for certiorari in the *Lester* case, the Government had this to say at page 8:<sup>2</sup>

“In this case, the accident underlying the litigation occurred on a clear day while the Q-100 was high and dry for purposes of improvement and overhaul. While engaged in the overhaul \* \* \*

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<sup>2</sup>Reference to the Government's brief is based upon a communication received from eastern counsel in the case. We have unsuccessfully endeavored to locate a copy of the brief in San Francisco. Since this petition for rehearing is now due, time does not permit for air mail correspondence to obtain a copy of it before the petition will be filed. We have telephoned counsel in that case for copies for immediate delivery to the Clerk of the Court and to counsel for appellee.

Under the decisions of this Court,<sup>6</sup> *petitioner, a shore based electrician, is of course, entitled to a seaworthy ship* which means that the ship must be reasonably fit but not that it can 'weather all storms.' *Boudoin v. Lykes Bros. SS. Co.* 348 U.S. 336, 339. The Q-100 clearly met this test. *Petitioner* was provided 'with a motionless, unobstructed, and virtually level canvas-covered surface from which (he), an experienced dry dock worker, could \* \* \*'" (Emphasis supplied.)

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<sup>6</sup>"*Seas Shipping Co. v. Sieracki*, 328 US 85; *Pope & Talbot, Inc. v. Hawn*, 346 US 406; *Alaska SS Co. v. Petterson*, 347 US 396."

Thus did the Government clearly present to the Supreme Court of the United States in the *Lester* case the legal view that a shore based worker is entitled to a seaworthy ship which is "high and dry for purposes of improvement and overhaul". Thus, also, did the Supreme Court, by not disavowing the Government's version of the law on this subject, indicate its approval thereof, in its grant of certiorari.<sup>3</sup>

*Imperial Oil, Ltd. v. Drlik*, 234 F. 2d 4 (C.A. 6, 1956), cert. den. 352 U.S. Advance Sheet No. 3, page 941. The Court of Appeals had affirmed the District Court, but reduced the award for excessiveness. *Drlik*, like *Lester*, supra, and like *Berryhill* in the instant case, was a shoreside worker in the employ of a shipyard which was engaged in the repair of a vessel on

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<sup>3</sup>We have been informed on February 7, 1957, by counsel in the case, that the *Lester* case is now fully disposed of. The government paid the full amount of the judgment rendered in the District Court, plus interest and costs.

drydock. He was injured in the course of the repairs being made to the vessel.

In the case at bar, the Court apparently regarded the nature and extent of the repairs of some significance, when it said:

“In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the ship’s work time, but were of sufficient importance to cause the ship to be drydocked” (238 F. 2d 387.)

It is to be noted, however, that the same was true in *Lester* and *Drlik*, both *supra*. In the latter case *Drlik*, having succeeded in the District Court and the Court of Appeals, also successfully resisted certiorari. The Supreme Court, in denying certiorari, had before it the following description of the work:

“The Imperial Leduc had been materially damaged as the result of an explosion and fire, and at the time of the accident on August 8, 1952, was being repaired by the American Ship Building Company at its Toledo, Ohio, Yard. Appellee was an employee of the American Ship Building Company. The vessel was in drydock preparatory to being undocked for removal to an adjacent pier to complete repairs. She was headed bow in, with four of her mooring cables running from winches on her deck to spiles located ashore, which held her in a proper position while the drydock was being flooded.” (234 F. 2d at p. 7.)

Neither of the foregoing Courts of Appeals finds, nor does the Supreme Court find that the nature or extent of repairs are material to the question whether the



doctrine of seaworthiness is to be extended to a shipyard worker.

The libel in *Drlik*, supra, was in two counts: (1) unseaworthiness under the General Maritime laws and (2) for general negligence. The Court of Appeals found that Drlik was entitled to the warranty of seaworthiness. It considered the question of the seaworthiness of the vessel, but found from the facts that the claim of unseaworthiness was not established. On the subject, the Court stated, at page 8 of 234 F. 2d:

“The admiralty rule that the vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment has been the settled law since the Supreme Court’s ruling to that effect in *The Osceola*, 189 US 175, 23 S. Ct. 483, 47 L. Ed. 760. *Mahnich v. Southern SS Co.*, supra, 321 US 96, 64 S. Ct. 455, 88 L. Ed. 561. The rule has lately been extended to stevedores and others doing a seaman’s work and incurring a seaman’s hazards, although not in the employ of the owner of the vessel. *Seas Shipping Co. v. Sieracki*, 328 US 85, 66 S. Ct. 872, 90 L. Ed. 1099. *Pope & Talbot Inc., v. Hawn*, 346 US 406, 412-413, 74 S. Ct. 202, 98 L. Ed. 143; *Alaska Steamship Co. v. Petterson*, 347 US 396, 74 S. Ct. 601, 98 L. Ed. 798. *Appellee would fall within the protection of the rule so extended.* However, in the present case there was no evidence that the vessel or any part of her equipment was defective.” (Emphasis supplied.)

The Court did find that the vessel was negligent.

We agree with this Court's statement at page 386, "The dissent (in the *Petterson* case) points out that the majority affirmance in *Petterson* goes one step further than *Sieracki* and *Hawn* cases, in holding that the equipment which causes the injury need not belong to the shipowner nor be a part of the ship's equipment."

In fact, a critical analysis of the dissenters' views in *Petterson*, leaves no room for doubt that the factors considered there, fit the appellant herein, so that he, too, is entitled to the warranty of seaworthiness.

We respectfully disagree with the Court in its step-by-step rationale, following the above quotation, which then leads it to what we earnestly believe to be an erroneous conclusion.

For example, at page 38, this Court states:

"The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends,<sup>1</sup> when the vessel is not on water. As the appellee here points out, a district court said in *Manera v. United States*, 124 Fed.Supp. 226 (E.D. N.Y. 1954):

'Since he was not a seaman and was not exposed to the peril of descending from the 'tween deck into the lower hold while the ship was rolling or pitching on the high seas, the test to be applied

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<sup>1</sup>"See:

*Myers v. Pittsburgh Steamship Company*, 165 F.2d 642 (1948);

*Guerrini v. United States*, 167 F.2d 352 (1948);

*Martini v. United States*, 192 F.2d 649 (1951);

*Manera v. United States*, 124 Fed.Supp. 226 (1954)."

was that of what a business guest would be entitled to exact from the ship while in the performance of such a task as he was engaged in while the ship was lying at this repair yard dock. It is believed that the foregoing is a correct statement in view of all that was written in *Pope and Talbot v. Hawn*, 346 U.S. 406 (Brief for Appellee, p. 9).’ ”

Several observations are in order:

(a) As to the statement that “the very reason for the rule of absolute liability ends when the vessel is not on water”, it is respectfully submitted that cases cited, *supra*, show that whether the vessel is on or out of water is not controlling.

(b) The reasoning of the *Manera* case, which this Court apparently adopts, that the absence of the traditional hazards at sea, as a reason to deny the warranty of seaworthiness to shoreside employees, is invalid, because:

1. The District Judge writing in *Manera*, relied on *Hawn* as justification for his views. But this was the very argument of the dissenters in *Hawn*, which must be deemed inappropriate since it obviously did not persuade the majority of the Supreme Court.

2. The *Manera* case was decided in September, 1954. It relied on *Hawn*, decided by the Supreme Court in December, 1953. However, in the meantime, *Petterson* was decided by the Supreme Court in April, 1954. Mr. Justice Burton, writing for the dissenting view in the *Petterson* case, and by referring to the *Hawn* case, catalogued (by reference) the many haz-

ards and restrictions of the seafaring man, as contrasted with the work of a land-based worker, as reason why the shoreside employee should not be entitled to the seaworthiness warranty. Mr. Justice Burton stated, at page 864 of 1954 A.M.C.:

“The historical analogy (as to seaman’s hazards) disappears in the instant case. The modern stevedores, who supply substantial loading equipment, are a far cry from the traditional wards of the admiralty around whom the Court threw its protection in the *Osceola* case.<sup>5</sup>

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<sup>5</sup>For a statement of the contrast between the traditional wards of the admiralty and modern longshoremen, see dissent in *Pope & Talbot v. Hawn*, 346 U.S. 406, 423-426 \* \* \*

In the earlier *Hawn* case, to which Mr. Justice Burton refers, the contrast of hazards between men at sea and ashore is discussed as follows:

“Contrast the lot of this plaintiff (*Hawn*) who lived at home, was free to leave his employment, took no risks at sea, and had no different conditions or hazard attached to his employment than would have attached to a carpentry job in a building ashore.” (1954 A.M.C. 18.)

In both the *Hawn* and *Petterson* cases, the minority sought to persuade the majority of the Court, unsuccessfully, that because the hazards and disciplines of men at sea are greater than those to which shoreside workers are subjected, that therefore the latter should not benefit by the warranty of seaworthiness. So that within four months, the Supreme Court twice rejected that argument, and extended the doctrine of seaworthiness to men who work ashore. The *Manera*

case, which this Court has cited, is therefore not a precedent for this point.

The cases cited by the Court in the footnote on page 337 of its decision are inapplicable. As to

(1) The *Meyers* (1948) case—The suit, by a shipyard worker, was not brought for a breach of the seaworthiness warranty. The injury occurred on a shipyard dock. The Court recognized the validity of *Sieracki*, but pointed out that the *Meyers* suit was brought for negligence only. In its dicta, the Court conceded that if the action had sought relief for a breach of the seaworthiness guaranties, it would probably have to be extended to a case like *Meyers*. Furthermore, the case was decided three years before the *Hawn* and *Petterson* cases were decided by the Supreme Court.<sup>4</sup> Hence, there would have been no question of the applicability to *Meyers* of the doctrine settled by the Supreme Court.

(2) The *Guerrini* (1948) case—The Court denied the doctrine of seaworthiness to an injured shoreside ship's boiler-cleaning man. In discussing *Sieracki*, the Court refused to extend the *Sieracki* doctrine to *Guerrini* because the Court felt bound to apply it only to stevedores engaged in "loading and unloading cargo." Judge Learned Hand conceded that *Sieracki* would probably have to be extended to the kind of shoreside

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<sup>4</sup>*Rogers v. U. S. Lines*, 347 U.S. 984, heretofore referred to was also decided by the Supreme Court in 1954. It gave the *Rogers* case the summary, short shrift, which it deserved, i.e., "The petition for certiorari is granted and judgment reversed", thus affording *Rogers* (a longshoreman) the benefits of the seaworthiness warranty.

worker involved in the *Guerrini* case,—a prediction borne out by decisions subsequent to *Guerrini*.

(3) The *Martini* (1951) case—Also involved an employee (general superintendent) of a shoreside repair company. The Court relied on *Guerrini*, already discussed above, as a precedent.

(4) The *Manera* (1954) case—Has already been reviewed, *supra*.

Finally, this Court states, at pages 387-388 of its opinion, that:

“The appellant has his statutory remedy against the employer [Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 901, et seq.].”

This expresses the unavailing dissenting views, specifically expressed by the minority in the *Petterson* case (1954 A.M.C. at page 865), and inferred by the dissenters in *Hawn* (1954 A.M.C. at page 17). If, as we maintain, appellant is entitled to the warranty of seaworthiness, it should be of no significance, that he may be, in these circumstances, entitled to what may properly be described as an *alternative* benefit guaranteed under the Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 901, et seq.

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### CONCLUSION.

We have examined the several errors in the opinion of the Court. We have tried to point them up, in order to restore to appellant the valuable right which

has been denied to him by this Court's affirmance of the judgment below. We believe that the opinion of this Court in the instant case conflicts with the spirit of the law by the Supreme Court in the cases reviewed in this petition. It certainly is counter to the views of the Court of Appeals of at least two other Circuits.

In these circumstances this petition for a rehearing should be granted, and it should be heard en banc.

Dated, San Francisco, California,  
February 8, 1957.

Respectfully submitted,

DARWIN & PECKHAM,

By JAY A. DARWIN,

*Attorneys for Appellant  
and Petitioner.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above-entitled cause. In my judgment the foregoing petition for a rehearing is well founded in law and in fact. I further certify that the petition is not interposed for delay.

Dated, San Francisco, California,  
February 8, 1957.

JAY A. DARWIN,  
*Of Counsel for Appellant  
and Petitioner.*



No. 14,995

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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MASAO HIRASUNA, doing business as  
Mike's Auto Top Shop & Uphol-  
stery Shop,

*Appellant,*

vs.

S. V. MCKENNEY, District Director  
of Internal Revenue,

*Appellee.*

Upon Appeal from the United States District Court  
for the District of Hawaii.

**OPENING BRIEF FOR MASAO HIRASUNA, APPELLANT.**

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No. 14,995

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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MASAO HIRASUNA, doing business as  
Mike's Auto Top Shop & Uphol-  
stery Shop,

*Appellant,*

VS.

S. V. MCKENNEY, District Director  
of Internal Revenue,

*Appellee.*

Upon Appeal from the United States District Court  
for the District of Hawaii.

**OPENING BRIEF FOR MASAO HIRASUNA, APPELLANT.**

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**JURISDICTIONAL STATEMENT.**

This is a civil action, filed in the court below under 28 U.S.C.A. Sec. 1340, for the return of \$1,391.92 (Tr. p. 48) of Federal excise taxes paid on May 30, 1953 by the appellant (Tr. p. 48), a citizen and resident of the Territory of Hawaii (Tr. p. 44). The defendant, appellee, was the District Director of Internal Revenue of the United States of America covering the Hawaii District beginning in November 1952.

He was the District Director on May 30, 1953 when appellant paid his tax and on May 2, 1955 when this suit was filed in the court below. (Tr. p. 50.)

On October 27th, 1954 appellant duly filed his claim for refund with defendant, appellee (Tr. p. 50) and on April 22, 1954 appellee denied said claim of appellant (Tr. p. 33). Appellant promptly on May 2, 1955 filed this suit in the court below. (Tr. p. 17.) Appellee answered (Tr. p. 32) and a trial was held beginning October 14, 1955. (Tr. p. 65.) A decision was entered against appellant (Tr. pp. 50-60) on December 1, 1955 and on December 8, 1955 a judgment was entered in favor of appellee (Tr. p. 60).

Appellant appealed from said decision and judgment by filing his appeal and notice of appeal on December 21, 1955. (Tr. p. 62.)

The United States Circuit Court of Appeals for the Ninth Judicial Circuit has jurisdiction upon appeal to review the judgment entered below by virtue of the provisions of the judicial code as amended, 28 U.S.C.A. 1294.

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#### **STATEMENT OF THE CASE.**

The stipulated facts (Tr. pp. 43-50) are that appellant is and was, at all times material herein, a citizen and resident of the Territory of Hawaii. Appellee is and was at all times material herein, a citizen and resident of the Territory of Hawaii and he was the sole District Director of Internal Revenue of the

United States Government covering the Hawaii District during the years 1953, 1954 and the year 1955 up to September 1st, 1955; as such he had full power and authority to collect the taxes in dispute herein. (Tr. p. 49.) Appellant at all times material herein, operated a business under the name and style "Mike's Auto Top and Upholstery Shop" at 1714 Kapiolani Boulevard, Honolulu, Territory of Hawaii and that in early 1953 the Appellee through his agents made assessment against appellant in the total sum of \$1,766.70 for excise taxes due as alleged manufacturer of auto parts under Section 3403 of the Internal Revenue Code of 1939. That the assessment covered (Tr. pp. 45-47) the years 1949, 1950, 1951, 1952 and 1953 (up to September). That of the \$1,766.70 appellant stipulated that \$374.78 was properly assessed, leaving \$1,391.92 in dispute in this case. The amount of \$1,391.92 was stipulated to "consist of amounts assessed against sales to used car dealers of custom made seat covers only". (Tr. p. 48.)

It was further stipulated that appellant paid said assessment on May 30, 1953 (Tr. p. 48) and that on October 27, 1954, appellant regularly filed with appellee four claims for refund for each of the periods above mentioned. Appellee in his answer admits (Tr. p. 33, par. 6) that claims in the form attached to the appellant's complaint (Tr. pp. 7-13) were filed for the respective years and in the respective amounts and that on or about April 22, 1955 said claims were denied by letter of appellee, a copy of which was attached to the complaint. (Tr. p. 7, par. 7.)

The stipulation further provided that no part of the \$1,391.92 "was collected by appellant from his customers at any time". (Tr. p. 48, par. 7.)

At the trial below the appellee did not present any witnesses. The only witnesses were appellant's witnesses, Shigeo Yatagai, Clyde Lee and appellant himself. The evidence adduced by appellant was uncontradicted. Therefore a summary of the testimony is hereby submitted for this statement of the case.

Appellant, Masao Hirasuna testified that he is forty years of age and is the sole proprietor of "Mike's Auto Top and Upholstery Shop" situated at 1714 Kapiolani Boulevard, Honolulu. (Tr. pp. 87-88.) His shop is situated within "Steve's Used Car Lot" in a building about 50 feet by 100 feet which contains, besides appellant's shop, an auto glass shop and an auto paint shop. He occupies a space about 20 feet by 50 feet in said building. The glass and paint shop are not appellant's. He has one employee and he himself does work with the employee. (Tr. pp. 88-89.) His equipment consisted of a sewing machine, scissors, knives, pliers, wrenches, hammers, screwdrivers, rules, yardsticks and other hand tools. (Plf's Ex. I) (Tr. p. 91.) For supplies he usually had in stock about 15 to 20 rolls of woven plastic cloth, leatherette, facing cloth, head lining cloth, wadding, springs, air foam rubber and other minor articles. (Plf's Ex. H) (Tr. p. 90). Besides upholstering he recovered auto tops, did auto ceiling, head lining, and auto door paneling. (Tr. p. 92.) By upholstering he meant general upholstering of the complete inside of a car. (Tr.

p. 92.) Besides appellant's shop there were about a dozen other similar upholstery shops in Honolulu. (Tr. p. 106.)

Appellant further testified that within a circle of half mile from his place of business there were about a dozen used car dealers and about 99% or just about all of his business came from used car dealers. (Tr. p. 93.) The business of upholstering was obtained by telephone calls from the dealers, the dealer describing the pattern, color or combination. The cars to be repaired were delivered to appellant's place of business by the dealer or in some cases appellant called for the cars. (Tr. p. 93.) In some instances appellant took the samples down for the dealer's choice. (Tr. p. 94.) Appellant did from two to five cars a day depending on the type of material, trim work and design. (Tr. p. 109.)

The sitting portion of the front and back seats was referred to as the "cushion" and the portion of the seats where the person leans back was referred to as the "lazy back". (Tr. p. 94.) The procedure generally was that the cushions were taken out and measured. The cloth was then cut to an approximate length and laid on top of the cushion. The cloth is then pinned after pulling tight as possible and marked with chalk. The facing cloth is also then pinned on and chalked. The cloth is then taken off and cut, piping sewed and the cut portions are sewn together. (Tr. pp. 94-95.) The sewing for one cushion takes from 10 to 15 minutes. (Tr. p. 112.) Then the seat is vacuum cleaned, and springs replaced, if any are

broken, and all the corners are wadded with thin cotton and the covers installed with tacks or hog rings, which were described as half moon rings of about one-half inch radius gripped on with a special tool. (Tr. pp. 95-96.)

There was considerable testimony by appellant regarding the repair of the "lazy back" because various makes of cars had different types. On General Motors' cars the front seat "lazy backs" have a steel shell on the back and said shells are removable. The "lazy backs" also come off the car. The "lazy back" is then upholstered in the same process as above described for the cushions. (Tr. pp. 97-98.) The shell is not covered unless the customer requests and if covered it is a separate cover from the cushion and lazy back cover. (Tr. p. 99.) For cars which do not have shell back buckets covers are made to cover the lazy backs. Bucket type covers are entirely different from those made where there is a steel shell. (Tr. p. 103.) General Motors' cars constituted about 65% of his business. Chrysler make cars and Kaiser cars up to 1952 were made like General Motors' in that the shell and lazy backs had to be separately covered. (Tr. p. 128.)

As for the back seat, appellant testified, the process of covering the "lazy back" becomes complicated in cases where there is a movable arm rest in the center of the "lazy back". The lazy back then is removable in 3 sections, lazy back, big arm rest and lazy back. There are three covers made to fit the three sections in such cases. (Tr. p. 100.)

Appellant testified that by the use of various types of cloth various designs may be made. Plaintiff's Exhibit J shows the various designs. The customer chooses the design (Tr. p. 101) and there are hundreds of other designs which could be made. (Tr. p. 117.) With relation to the ways the cloth are cut some standard designs were shown on Plaintiff's Exhibit K. The designs are used in accordance with customer requests or in certain cases a certain design must be used to take out the "wrinkles". The cushions and "lazy backs" are expertly cut to fit the particular cushion or "lazy back" and it takes an experienced and skilled person to put the sewn material on the cushion or lazy back. (Tr. p. 121.) There are a "lot of tricks and know-how involved in it". The sewn together material is not usable for any other car than that which it was cut and sewn for. (Tr. p. 121.) Each cushion varies, for example when a 250 pound man uses the cushion it really is a "different size altogether". Appellant further testified that he has been connected with the automobile business in some way since 1935 and he has never seen types of seat covers he installed in cars, sold in the market as auto parts. They couldn't be sold because his covers are "really sloppy, you just can't make head or tails on them, because you just got to know how to install it". (Tr. p. 124.) But in comparison, the ready made covers sold on the market have "a rope or grommet tacked on the facing cloth which you could tie it with a rope, you know, and they have springs that you could hook

it onto the cushion and . . . they usually use pins on it, on the back of the covers". (Tr. pp. 124 and 125.) Furthermore ready made seat covers are all of the pocket type and they are held down between the cushion and the lazy back by means of a simple round cardboard about one inch in diameter, six inches long which is tucked in between the lazy back and the cushion. (Tr. p. 123.) Appellant's covers do not have such cardboard devices. (Tr. p. 129.)

Of the cars handled by the Appellant he testified that about 85% have non-factory covers on when they are brought in (Tr. p. 96) and occasionally there are 2 non-factory covers on. (Tr. p. 113.) These covers are removed before the appellant starts upholstering. (Tr. p. 96.) The factory covers are not removed because the cotton will become separated from the frame. (Tr. p. 114.) And most of these factory covers are worn out. In most cases the cotton padding could be seen because of the worn out condition. (Tr. pp. 125-126.)

Appellant never made seat covers to be held in stock. (Tr. p. 108.) All of the seat covers installed by the appellant, on which the excise taxes were imposed by appellee, were made after the cars were brought and never ahead of time. (Tr. p. 108.)

The prices appellant charged car dealers were \$18.00 for fibre, \$28.00 for plastic and \$35.00 for leatherette. Said prices included all labor cost and material cost. (Tr. p. 104.) The covering of the shell was included in the said prices in many instances. (Tr. p. 110.) The



labor cost is for all labor including labor for removal of seat parts, fitting, cutting, sewing and installation labor. The job of taking the seat parts out of the car was described as hard job. (Tr. pp. 122, 123.) Of the prices above quoted about 2/3 was for cost of material and 1/3 was for labor. (Tr. p. 122.)

Shigeo Yatagai testified that he represented in Hawaii a Los Angeles firm, Bolt and Lindsay, distributor of upholstery materials. He sold to appellant the upholstery materials listed in Plaintiff's Exhibit H above mentioned. (Tr. pp. 67-68.) These articles were not excise tax paid articles. (Tr. p. 69.) The materials sold appellant were not materials exclusively for automobile upholstery, they were used by others for furniture upholstery. (Tr. p. 70.)

Clyde Lee, an Internal Revenue Agent for Internal Revenue Service testified that he was since 1946 employed in the Audit Department in Hawaii. (Tr. p. 71.) He differentiated public rulings and private rulings. That private rulings are occasionally available to the members of the Internal Revenue Staff. (Tr. p. 73.) The Hawaii office received copies of private rulings originating from taxpayers within Hawaii. (Tr. p. 76.) If a private ruling relates to a taxpayer outside of Hawaii, the Hawaii office may or may not have copies of it. (Tr. p. 76.) Plaintiff's Exhibit A, a public ruling, dated August 18th, 1952 relating to manufacturers of auto seat covers was shown the witness. He testified that he did not know what the prior rulings referred to in said exhibit were. (Tr. p. 78.)

He made a search of his office for the said prior rulings but didn't find any. (Tr. p. 84.) He was the tax official who made appellant's assessment. (Tr. p. 86.) He made several other similar assessments of similar nature in 1953 (Tr. p. 85) and there were many others of similar nature made. (Tr. p. 85.)

Appellant testified that he first discovered that the taxes in question may be due just a few months before August 1952. (Tr. p. 106.) He thought that it was in June, 1952. Prior to said time he didn't know about it. (Tr. p. 106.) In the latter part of 1952 about a dozen people operating automobile upholstery shops organized an association because of this excise tax. (Tr. p. 107.) Appellant did not for the respective years file an excise tax return for the assessed taxes (Tr. p. 48, par. 7) for the respective assessments. The assessments were not additional assessments because no prior return had been filed by appellant for the respective years. (Tr. p. 48, par. 7.)

On the foregoing evidence the trial court rendered its decision and judgment against appellant. (Tr. pp. 51 and 61.) Appellant appealed to this court. (Tr. p. 62.)

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### QUESTIONS PRESENTED.

This case on appeal involves the construction of Section 3403(c) of the Internal Revenue Code of 1939, as amended. It reads:

“Section 3403. Tax on automobiles, etc.

“There shall be imposed upon the following articles sold by the *manufacturer*, producer, or

importer, a tax equivalent to the following percentages of the price for which so sold:

“(c) *Parts or accessories . . .* for any of the articles enumerated in subsection (a) or (b) . . .”  
26 U.S.C.A. 3403(c) (emphasis supplied).

The Treasury regulations provide that “The term ‘manufacturer’ includes ‘producer’ and ‘importer’.”  
26 C.F.R. 316.1(b).

The questions presented are: (1) Whether appellant herein was a “manufacturer” and (2) Whether the sale of seat covers by said appellant was a sale of “parts or accessories.”

---

#### SPECIFICATION OF ERRORS.

The District Court erred in entering the Judgment dated the 8th day of December, 1955, and the Memorandum Opinion of the 1st day of December, 1955. The reasons are as follows:

1. The finding of the District Court that appellant was a manufacturer under Section 3403 of the Internal Revenue Code of 1939, as amended, is contrary to the published rulings of the Bureau which were in effect during the respective tax periods.

2. The District Court, in basing its decision on an unpublished ruling, erred in that said unpublished ruling was not introduced in evidence by the appellee and unpublished rulings are not matters of which a court takes judicial notice.

3. The finding of the District Court that appellant was a manufacturer is contrary to case authority and

to the evidence produced, which shows that appellant's upholstering jobs constituted repair and/or reconditioning.

4. The District Court erred in including installation charges in determining the basis of the tax contrary to 26 C.F.R. 316.8(a), requiring such charges to be excluded.

5. The District Court erred in finding that the seat covers were "accessories" against the dictate of 26 C.F.R. 316.55(b), which provides that an article, before it can be denominated as a part or accessory, must be "commonly or commercially known" as such.

6. The District Court erred in completely overlooking the distinction drawn in the cases and regulations between contracts of sale and contracts for labor and materials.

7. The District Court erred in completely disregarding the fundamental rule that where taxing statutes are ambiguous, such ambiguity must be construed against the taxing authorities and in favor of the taxpayer.

---

#### **SUMMARY OF ARGUMENT.**

1. The fundamental rules of construction must be kept in mind in applying the statute in question, for these rules are guides in the construction of revenue statutes.

2. The published rulings of the Bureau in effect during the respective tax periods inevitably leads one

to conclude that sales of seat covers specially made for the customer, regardless of whether said customer is an individual automobile owner or is a new or used car dealer, are not subject to tax. Such administrative construction, long established and uniformly and consistently adhered to, although not binding on the courts, is persuasive and entitled to high respect.

There was no evidence to establish the existence, number, contents and time of issuance of the unpublished rulings, which are not matters of which a court takes judicial notice. The court, therefore, erred in relying on said unpublished rulings for its decision.

The published ruling of August 18, 1952, is of no retroactive effect.

3. The finding of the District Court that appellant was a manufacturer is unsupported by case authority. To the contrary, case authority supports the contention that appellant was a repairer and not a manufacturer. It appears that the court has misinterpreted the cases and has based its decision on cases distinguishable from the case at bar on the facts.

4. 26 C.F.R. 316.8(a) requires that installation charges be excluded from the sale price in determining the basis of the tax. The District Court failed to comply with this provision.

5. Before an article can be denominated a "part or accessory," it must be a product "commonly or commercially known" as a part or accessory. 26 C.F.R. 316.55. It is contended, on the basis of the facts as adduced from appellant's undisputed testimony, that the seat covers in the case at bar were

not products "commonly or commercially known" as parts or accessories.

6. The great weight of authority, at common law and under the Uniform Sales Act, holds that, as a matter of law, contracts for labor and materials are not contracts of sale. Two District Courts have applied the distinction to the revenue statute here in question and have held that said statute, by taxing contracts of sale only, does not have within its purview contracts for labor and materials. This view appears to be supported by the Treasury regulations. State courts have also applied the distinction to state revenue statutes.

That the sales of seat covers in the case at bar were sales of labor and materials, is supported by the District Court decisions and other case authority.

7. The writer therefore submits, in view of the cases, regulations, and published rulings, that appellant was not a "manufacturer" and did not sell "parts or accessories" within the intendment of the statute. However, if, for some reason, all prior arguments are rejected by this Court, it is contended that this court must still find for appellant on the basis of the fundamental rule that all doubts must be resolved in favor of the taxpayer.

## ARGUMENT.

### I.

#### CONSTRUCTION OF REVENUE STATUTES.

It is of primary importance in this case to keep in mind a few fundamental principles courts have always referred to in construing tax statutes. These principles are tools with which legal minds work; but like a mechanic who attempts to do a job without tools and fails, a legal mind which operates without the constant reference to or reminder of the tools of thought which even jurists on the Supreme Court have used to guide them, may fall in error.

First of all, "*It is elementary that tax laws are to be interpreted liberally in favor of taxpayers, and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers.*" (Emphasis supplied.) *Miller v. Standard Nut Margarine Co. of Florida*, 284 U.S. 498, 508, 52 S.Ct. 260, 263. See also: *Gould v. Gould*, 245 U.S. 151, 153, 38 S.Ct. 245; *U. S. v. Merriam*, 263 U.S. 179, 187 44 S.Ct. 69; *Bowers v. N. Y. & Albany Co.*, 273 U.S. 346, 350, 47 S. Ct. 389. Certainly when two District Courts, as will be shown later, concurred with appellant's views in this matter, laying emphasis on the foregoing rule, it cannot be said that the situation is without doubt and the rule does not apply. The trial court in this case in its opinion (Tr. pp. 50-60) did not even mention the above rule anywhere in its decision.

Another fundamental and just rule is that "*Taxation is an intensely practical matter and laws in*

respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences.” *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 212, 50 S.Ct. 98, 100. (Emphasis supplied.) See also: *First National Bank v. Maine*, 284 U.S. 312, 325, 52 S.Ct. 176; *St. Louis Union Trust Co. v. Burnet* (C.C.A. 8, 1932), 59 F.2d 922, 927; *Buhl v. Kavanaugh*, (C.C.A. 6, 1941), 118 F.2d 315, 323; *City Bank Farmers’ Trust Co. v. U. S.* (D.C. N.Y. 1934), 5 F.Supp. 871, 874.

The writer believes that these two fundamental rules should constantly be kept in mind in the consideration of this case and be used as guides where there is doubt as to which argument is more acceptable.

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## II.

### EFFECT OF PUBLIC RULING OF AUGUST 18, 1952 AND PRIOR PUBLIC RULINGS.

It must be kept in mind that the assessment in this case covered the period January 1, 1949 to August 31, 1952. In other words it covered a period prior to the issuance of the following public ruling (Plaintiff’s Exhibit A) made on August 18, 1952:

“Regulations 46 (1940), Section 316.55: Definitions of parts or accessories.

Application of the tax, imposed by section 3403(c) of the Internal Revenue Code, as amended, to the sale of automobile seat covers by a manufacturer who furnishes the material therefor and produces them for the consumer thereof according to individual design and measurement.



Section 3403(c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 per cent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsections (a) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 per cent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403(c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has *issued rulings* heretofore that the only circumstances under which the tax does not apply to sale of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, *that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but one for resale, and that the tax attached to the manufacturer's sale thereof.*

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons. The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measure-

ments, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past, to such sales.

Because of the past rulings of the Bureau concerning the non-application of the tax to automobile seat covers which are produced according to individual design and measurement for the consumer thereof, it has been concluded that, under the authority contained in section 3791(b) of the Code, the ruling set forth herein relating to seat covers so produced will not be applied retroactively with respect to sales of such seat covers prior to the date of this bulletin, except that any tax which has been paid on the sale of such seat covers will not be refunded, unless in a particular case it is established to the satisfaction of the Commissioner, as required under section 3443(d) of the Code, that the manufacturer, by reason of relying on an existing ruling that the sale of seat covers so produced was not taxable, did not include in his price any part of the manufacturers' excise tax which he may have subsequently paid on the sale." (Emphasis supplied.)

The foregoing public ruling being published on August 18, 1952, the appellant did not have actual notice thereof prior to its publication.

It is of utmost importance that prior to August 18, 1952, all of the public rulings then in effect would have led any taxpayer in the appellant's position to believe that the transactions assessed as taxable by

appellee were not taxable. To start with, Plaintiff's Exhibit "B", a public ruling read as follows:

"Prentice Hall, Fed. Tax Service Vol. 3-A, Paragraph 38,571.

Taxability of sale or use of parts or accessories measured and cut from raw or bulk material.—\* \* \* A jobber or dealer frequently buys material, not subject to tax, and *by cutting or processing the material to the required length or size produces a part or accessory. In deciding whether the transaction is taxable, the Bureau has drawn a distinction between an immediate repair job and a sale for future use. If the part or accessory is cut or produced from lengths of rolls of material for immediate use by a repairman in a repair job on which he is then working, the sale thereof by the jobber or dealer to the repairman is deemed to be a sale of material not subject to tax. If, however, the jobber or dealer transforms lengths or rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes the manufacturer of such articles within the meaning of the Act, and his subsequent sale or use thereof is taxable under section 606(c) of the Revenue Act of 1932. (S.T. 824, CB. Dec. 1935, p. 368.)*" (Emphasis ours.)

Would any taxpayer in appellant's position take a position contrary to what the appellant did, in view of the above? Any reasonable person in appellant's position would have been led to believe that the very words of the above public ruling made the transaction nontaxable.

In addition to the foregoing, Plaintiff's Exhibit "C", another public ruling, certainly was in appellant's favor. It read as follows:

"Prentice Hall, Fed. Tax Service Vol. 3-A, Paragraph 38,592.

Repairs held not subject to tax.—Repairs on automobiles performed in a repair shop, such as painting, *upholstering*, changes in, or replacements of woodwork, and repairs to fenders and bodies are deemed to be in the nature of general repair work, rather than articles sold, and are not subject to tax under section 606 of the Revenue Act of 1932. (S.T. 582, C.C. Dec. 1932, p. 472.)" (Emphasis ours.)

It is customary for one interpreting tax laws, to look into similar situations. With relation to the installation of auto glass, a public ruling (Plaintiff's Exhibit "D") provided as follows:

"Prentice Hall, Fed. Tax Service Vol. 3-A, Paragraph 38,583.

S.T. 928, above, holds that sales of glass cut to automobile patterns are subject to tax under Sec. 3403(c), IRC, except where, in connection with an immediate repair job, the glass is cut to pattern pursuant to a customer's order and is installed by the person who cut the glass. The term 'customer' as used in S.T. 928 applies to any patron of the glass dealer, *without any distinction as between consumers or individual owners and dealers or others engaged in business*. Accordingly, where upon order of his customer, a glass dealer both cuts and installs replacement glass in an automobile under immediate repair,

no excise tax liability attaches, *irrespective of the character of the customer for whom the services are performed*. However, where a glass dealer cuts replacement glass and sells it to another person for installation, excise tax liability attaches to such sale. S.T. 940, CB 1951-2, p. 214." (Emphasis supplied.)

It not only shows that a glass cutter who installs it in a car is not a manufacturer but the fact of the customer's status, whether a dealer or an ultimate consumer, would not make any difference. In the present case 99% of the plaintiff's customers were used car dealers. (Tr. p. 118.) But under the foregoing, public ruling, the status of the customer didn't make any difference. Wouldn't any reasonable person reading the above be led to believe that the customer status was immaterial?

See also Plaintiff's Exhibit "E" which public ruling read as follows:

"The tax also attaches to rebabbited connecting rods and reclaimed brake drums in which new steel bands have been inlaid where they are placed in stock to be sold as parts and accessories. However, where these articles are reconditioned in connection with an immediate repair job, the tax does not attach. S.T. 573 C.B. Dec. 1932, page 473."

The above mentioned public rulings, all interpreting the same section 3403 of the Internal Revenue Code of 1939 as applied to auto parts were all of the public rulings appellant could have resorted to on this subject prior to August 18, 1952. They clearly indicated

that appellant did not have to pay taxes on the transactions upon which appellee assessed taxes. In the trial of this cause, appellee wasn't able to point to a single public ruling which indicated otherwise.

These public rulings abovementioned (Plaintiff's Exhibits B, C, D and E) were long established and uniformly and consistently adhered to. Appellee did not at any time in the trial court show that it was otherwise. Such public rulings, although not binding on the courts, are persuasive and entitled to high respect and should not be lightly set aside except for very cogent reasons. *Farmer's Cooperative Co. v. Birmingham* (D.C. Iowa 1949), 86 F.Supp. 201, 229; *Greer v. Birmingham* (D.C. Iowa 1950), 88 F.Supp. 189, 221; *C.I.R. v. Swift & Co. E.B.A.* (CCA 7, 1945), 151 F.2d 625, 629; *Estate of Sanford v. C.I.R.*, 308 U.S. 39, 52, 60 S.Ct. 60. It is seldom that a tax litigant advances a public ruling and cites it in his favor. But in the present case because of the circumstances prior to August 18, 1952, said rulings are in appellant's favor. It is submitted that the government shouldn't be allowed to say that the rule isn't applicable when the shoe is on the other foot.

It was not only the public rulings made by the government itself which misled the appellant but there was a judicial decision unappealed by the government which clearly held that what appellant did was not manufacturing but a bare sale of labor and materials. A Federal District Court in Connecticut in 1926 decided in the case of *John J. Roche Co. v. Eaton*, 14 F.2d 857, 858 as follows:

“The plaintiff is a Connecticut corporation, having its place of business in Hartford. During the period in question it did a general automobile repairing business, and fitted, among other things it made, automobile side curtains, tops, slip covers, and carpets to the special order of its patrons. It carried no stock of manufactured articles with which to supply its customers, but made all materials up specially for each job as it was presented, to suit the whims and orders of each particular customer. It also repainted motor cars and reupholstered them. It repaired automobile bodies and fenders. It cut and fitted all the new material supplied from a stock of material on hand, for each customer, and it supplied all the new material that was used in the work of replacement or repair.

The tax was assessed on the price received by the plaintiff for the various articles above enumerated and supplied by the plaintiff to its patrons from 1921-1923, on the theory that the plaintiff was a manufacturer or producer of parts or accessories of automobiles, who sold the same.

It will not be questioned that a distinction exists between a contract of sale and one for work and materials. The distinction is not recent. It was recognized long anterior to the passage of the act of 1919. I will not assume that Congress was ignorant of its existence, and that, in the use of language having definite and ascertained legal connotations, it intended to disregard them. The motion or theory that, because the statute applicable is a taxing statute, its language was destined for lay persual and devised for a lay interpretation, is a trifle overingenious. The law

emanating from Congress is always addressed to all the people. Rules of statutory construction do not vary in accordance with the assumed learning or intelligence of the class which in any given instance is specially affected by the legislation.

I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction. While the line of demarcation between a contract of sale and one for services and material is often elusive, that is not a consideration which impugns the validity or the reality of the distinction.

I therefore hold that the parts or accessories (assuming that they are such) were not sold by the plaintiff within the intendment of the statute, and the excise tax levied and collected should be remitted. If I had any doubt as to the interpretation to be given to the statute, then under well-settled rules of construction I would be compelled to resolve that doubt in favor of the taxpayer.''

The above decision was unappealed, and remained in the books as the leading case on this subject. From 1926 to the date of this brief no other decision (except that sought to be reviewed herein) has reversed the logical decision of the Federal District Court of Connecticut.



When public rulings are supplemented by court decisions, the Supreme Court of the United States, stated in *Estate of Sanford v. C.I.R.*, 308 U.S. 39, 52, 60 S.Ct. 60 as follows:

“Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is *not so inconsistent with applicable decisions of the courts* as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it.”

The public ruling of August 18, 1952, aforequoted, refers to prior rulings but said rulings were private rulings. What the said private rulings were, are still a mystery in this case in that in the court below evidence of said ruling was unavailable in the Hawaii office of Internal Revenue. (Tr. pp. 78, 84.) Appellee did not even make an effort to obtain it. Witness Clyde Lee, an Internal Revenue agent in Hawaii since 1946 didn't know that there was such a private ruling until he saw the public ruling of August 18, 1952. (Tr. p. 78.) At the time he testified in the trial court even he had never seen the private ruling.

The sudden move by the Hawaii office to make back assessments on these small businessmen like ap-

pellant after August 18, 1952 (Tr. p. 85) is further evidence of the fact that even internal revenue men in Hawaii didn't know about said private rulings prior to August 18, 1952. This court nor the lower court takes judicial notice of private rulings. This is elementary. See 31 C.J.S. Sec. 39, page 601.

It must be remembered that we are not here dealing with a net income tax. The tax herein discussed is one in the usual course of trade, if known by taxpayer, collected from the customer. It was stipulated in this case, that appellant did not collect such taxes from his customers during the period involved. (Tr. p. 48.) Furthermore, the tax imposed was an 8% tax, a tax high enough to absorb all of one's profit under present day competitive situations.

The practical effect of the government's actions up to August 18, 1952 was to say to these small businessmen, by these public rulings (Plaintiff's Exhibit B, C, D and E hereinabove referred to and quoted) you need not collect these taxes from customers. Said businessmen were further assured by the court decision in *John J. Roche Co. v. Eaton*, supra, unappealed by the government in 1926. The statutes, section 3403 of the 1939 Internal Revenue Code, interpreted by these public rulings and the decision certainly left no area of doubt. But in August of 1952, the government reversed its position and in effect made the prior secret private ruling retroactive by reciting them in a public ruling. The practical effect on these small businessmen was to force them to pay the tax they could have collected from customers, had they not been misled, out of their own pockets.

A more unjust and oppressive situation could seldom be found in our taxing history. It is submitted that "Taxation is an intensely practical matter and laws in respect of it should be construed and applied *with a view of avoiding, so far as possible, unjust and oppressive consequences.*" *Farmer's Loan Co. v. Minnesota*, 280 U.S. 204, 212, 50 S.Ct. 98, 100 (supra); *First National Bank v. Maine*, 284 U.S. 312, 325, 52 S.Ct. 176; *St. Louis Union Trust Co. v. Burnet* (C.C.A. 8, 1932), 59 F.2d 922, 927; *Buhl v. Kavanaugh* (C.C.A. 6, 1941), 118 F.2d 315, 323; *City Bank Farmers' Trust Co. v. U. S.* (D.C. N.Y. 1934), 5 F.Supp. 871, 874.

In closing this argument appellant wishes to point out that the public ruling of August 18, 1952 does not have the force and effect of Treasury regulations. See 5 U.S.C.A. Sec. 1002; *Hotch v. U. S.* (C.C.A. 9, 1954), 212 F.2d 280, 282-3; *U. S. v. Morelock* (D.C. Md. 1954), 124 F.Supp. 932, 944, 26 U.S.C.A. Sec. 3450; *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 468, 54 S.Ct. 806, 810; *Biddle v. Commissioner*, 302 U. S. 573, 582, 58 S.Ct. 379, 383; *Cahn v. C.I.R.* (C.C.A. 9, 1937), 92 F.2d 674, 676; "Cautionary Notice" to Internal Revenue Bulletin, August 18, 1952, No. 17. Moreover, it is not entitled to any respect and has no persuasive force whatsoever. It is well settled that a court will not follow an administrative construction of revenue statutes where it has not been adhered to uniformly and consistently. *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 498, 54 S.Ct. 292; *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 16, 52 S.Ct. 275; *Miller v. Standard Nut Margarine Co.*, 284 U.S.

498, 507-8, 52 S.Ct. 260; *Iselin v. U.S.*, 270 U.S. 245, 251, 46 S.Ct. 248. Said ruling, not having even prospective application as a regulation cannot be of retroactive application.

It is submitted that the lower court's decision and judgment should be reversed on this argument only.

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### III.

#### THE POSITION OF THE TRIAL COURT IS UNSUPPORTED BY AUTHORITIES.

The opinion of the lower court as to the meaning of the term "manufacturer" is manifestly unsupported by case authority. It is therefore the purpose of the writer at this point to analyze the decision of the lower court and compare it with the authorities. The Memorandum Opinion of the learned Judge below is hereby referred to.

The trial court held as follows:

"The ordinary meaning of manufacture includes any process with a resulting product, aside from natural products, so long as the hand of man was instrumental in bringing it about. This is manufacture in its broadest sense. Under the regulations the definition of manufacture is no less broad: 'The term "manufacture" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.' 26 C.F.R. sec. 316.4(a). Granting that the word

manufacture so defined is very broad, we see no reason why this broad definition should not control. See: *United States v. Armature Exchange*, 116 F.2d 969 (9 Cir. 1941), reversing *Armature Exchange v. United States*, 28 F.Supp. 10 (Cal. 1939); *United States v. Leslie Morris Co.*, 124 F.2d 371 (9 Cir. 1941); *United States v. Moroloy Bearing Service*, 124 F.2d 373 (9 Cir. 1941); *Henricksen v. Seward*, 135 F.2d 986 (9 Cir. 1943), holding that *Con-Rod Exchange, Inc. v. Henricksen*, 28 F. Supp. 924 (Wash. 1939) is not law; *Clawson & Bals, Inc. v. Harrison*, 108 F.2d 991 (7 Cir. 1939); *United States v. Armature Rewinding Co.*, 124 F.2d 589 (8 Cir. 1942); *Monteith Bros. Co. v. United States*, 142 F.2d 139 (7 Cir. 1944); *Clawson & Bals v. United States*, 182 F.2d 402 (7 Cir. 1950). Applying this definition to this case, we find that seat covers were in fact manufactured, for the cars came out of the shop with seat covers where there were none in the shop when the cars were driven in." (Tr. p. 57.)

Apparently, the learned judge below relied on the cases cited in his opinion for his decision. Said cases implicitly assume the basic premise that a repairer is not a manufacturer and therefore not subject to the manufacturers' excise tax. It thus becomes important to determine the meaning of the term "repairer". In the leading case of *Clawson & Bals v. Harrison* (7 Cir. 1939), 108 F.2d 991, 994, the court, in finding that the making of new rods from used and discarded connecting rods was manufacture rather than repair, enunciated the following principle:

*“Ordinarily a repairer furnishes labor and material to the owner of some article for the purpose of restoring the article to its normal condition. The article remains the property of the one for whom the service is performed. If this taxpayer is a repairer it is a repairer of its own property, not for the purpose of restoring its own property for efficient use in the ordinary operations of the taxpayer’s business, but for the purpose of preparing the property for sale in the trade. In the transactions between the taxpayer and its vendees the connecting rods, whether prepared from new forgings or from old connecting rods, are treated as newly and freshly produced automobile accessories. Neither taxpayer nor the trade recognizes that the finished connecting rods are repaired rods. Looked at from the standpoint of production and distribution in the trade the taxpayer is performing the function of a manufacturer rather than a repairer.”* (Emphasis supplied.)

In each of the other cases cited by the judge the same principle is applied with the same result under essentially similar facts. These cases, however, are clearly distinguishable on the facts from the case at bar and, although controlling in principle, should not be controlling in the result here. In each of the *Clawson & Bals* line of cases, the articles found to have been manufactured were articles which were produced and kept in stock for sale to the general market. The articles were articles of commerce, the production of which constituted the dominating feature of the process involved and formed the basis of the decisions.

Here, however, the seat cover is not an article of commerce. (Tr. p. 124.) It was not kept in stock for sale in the trade. (Tr. p. 108.) It was custom made (Tr. p. 120) and only after the car was brought in (Tr. p. 108). The dominant feature of the process in the case at bar, then, is the performance of labor and furnishing of material. The finding in the *Clawson & Bals* line of cases that the operation was manufacture and not repair, therefore, is clearly warranted by the facts. But not so here.

The trial court further held:

“Under the statute here involved the tax attaches only when a manufactured part or accessory is sold by the manufacturer. We have held that seat covers are manufactured parts or accessories, and that these seat covers were sold is not disputed. Thus the only remaining question is whether plaintiff is the manufacturer liable for the tax. Where a customer brings in his own materials and has the seat covers made by the jobber, he in effect is buying the skill and labor of the jobber so that the transaction becomes one for work and labor. To be sure, a seat cover has been manufactured, but the customer is the manufacturer and not the jobber. Here title to the article throughout the process is retained by the customer. See: *In re Burkhead*, 106 F.Supp. 527 (Texas 1952). On the other hand, where the jobber supplies the material as well as his skill and labor and the customer pays for the seat covers at a price for completed and installed seat covers, the jobber is the manufacturer and is liable for the tax. In *John J. Roche Co. v. Eaton*, 14 F.2d 857 (D.C. Conn. 1926), the court held this latter type of operation to be for work and labor. How-

ever, this case seems to have overlooked the question of who is the manufacturer.” (Emphasis supplied.) (Tr. p. 58.)

This portion of the opinion discloses three errors of misinterpretation committed by the trial court below, which are as follows:

One. The trial court below seems to be of the opinion that the question of manufacturing was assumed in the case of *In Re Burkhead* (D.C. Texas 1952), 106 F.Supp. 527, and that the issue on appeal in said case was as to who the manufacturer was, whether the jobber or the customer. To the contrary, the question of manufacturing was not assumed in said case, but was directly in issue. The court there, considering certain exchange transactions involving pressure plate assemblies, states the issue as follows:

“The Government assessed against him a tax liability under said statute on the above recited transactions in the principal sum of \$10,341.26, and filed a claim for such alleged taxes, plus interest, together with some other small items of uncontested taxes, in this bankruptcy action. The trustee contested the bankrupt’s liability for said sales taxes and the referee rejected entirely that part of the claim, on the theory that the bankrupt was not a manufacturer or producer selling automotive parts in the transactions aforesaid, but acted simply as a repair man. The Government was dissatisfied and presented its petition for review.”

It was then held:

“Any notion of a sale being latent in such course of business would be pointless under the



circumstances. It is more realistic, and likewise tenable, to stand on the premise that in law, as in practical business acceptance, the units sent in were constructively the same units received back with accretions and betterments incident to the reconditioning service, and that title throughout was retained by the customers."

And the court concluded:

"... that the bankrupt in any event was bailee rather than owner of the units dealt with in his exchange transactions, and consequently he was not a manufacturer or producer selling such units so as to become liable for the tax claimed."

Two. The trial court in the Memorandum Opinion states:

"Where a customer brings in his own materials and has the seat covers made by the jobber, he in effect is buying the skill and labor of the jobber so that the transaction becomes one for work and labor. To be sure, a seat cover has been manufactured, but the customer is the manufacturer and not the jobber."

The first sentence correctly states the law, but the second is nowhere sanctioned in *In Re Burkhead* or any other case. Such a rule is contrary to the definition of a manufacturer as provided in 26 C.F.R. 316.4.

Three. The following statement of the trial court is also incorrect:

"On the other hand, where the jobber supplies the material as well as his skill and labor and the customer pays for the seat cover at a price for completed and installed seat covers, the jobber is the manufacturer and is liable for the tax."

What difference does it make who supplies the material? Either the jobber is a manufacturer or he is not. The mere fact that he furnishes material does not make him a manufacturer, and this proposition is sanctioned in *In Re Burkhead*.

The case of *John J. Roche Co. v. Eaton* (D.C. Conn. 1926), 14 F.2d 857, therefore, stands unimpaired as a legal precedent on the matter.

Finally, the trial court held:

“Plaintiff claims that he is doing repair work. Use of the term ‘repair’ is deceiving in this area. Webster defines ‘repair’: ‘To restore to a sound or good state after decay, injury, etc.’ Whenever any component part or accessory of an automobile is put in serviceable condition, common parlance description is that the ‘automobile has been repaired.’ *Likewise, plaintiff here claims that the seats are being repaired. Broadly speaking (it) is not incorrect to maintain such a position for the reference is to the whole even though only a part thereof was fixed.* However, the word ‘repair’ in this context must have reference to seat covers and not seats. In other words, plaintiff must claim that the seat covers are being repaired. A seat cover is repaired only if a portion of it is redone and the basic seat cover is still intact. See: *Martin Tire Co. v. United States*, 130 F.Supp. 316 (Fla. 1955). Where the old seat cover is removed and a new one installed or where a new one is installed where none existed, the operation is not repair, but replacement or addition.” (Tr. p. 59.) (Emphasis supplied.)

The court, it is seen, relies on two basic propositions for its decision: (1) The term “repair” must have

reference to the seat cover, since the unit looked to is the seat cover and not the seat. (2) The operation is not repair where there is replacement or addition.

We first consider the first proposition. Manifestly, the trial court below was of the opinion that judgment depended on which unit was to be looked to—the seat or the seat cover. It expressly admits in the Memorandum Opinion that it is not incorrect to maintain the position that the seats are being repaired; in other words, it is proper to look to the seat as the unit. Undoubtedly, too, the court before rendering its decision believed at the same time that the seat cover was also a proper unit which could be considered in determining whether the operation was repair or not. Thus, it had two choices, either of which, it believed, could be taken as the proper unit. As stated in Argument I, the courts are charged by the fundamental rule of construction to construe revenue statutes liberally in favor of the taxpayer and most strongly against the government. Applying said rule, the seat and not the seat cover is the proper unit looked to, since obviously the former is the more liberal of the two alternatives. The court below, however, elected to look to the seat cover as the unit. The writer submits that rules of construction have a purpose and are not to be lightly set aside.

It may be argued that the rule of construction does not apply in this instance, since the word “repair” and not “manufacture” is at issue and construction of the former is not construction of the statute. However, the word “repair” is essential in the case

at bar in determining the meaning of "manufacture". By defining "repair" we define the limits of the term "manufacture", so that construction of the former is construction of the latter. The rule should apply, therefore, if the "unit test" as proposed by the court below be accepted.

We come now to the second proposition set forth by the court. That the court below was of the opinion that replacement or addition negatives repair, seems to have been influenced by Mr. Dwight's cross-examination of appellant in the proceedings below. This appears in the Transcript of Proceedings (Tr. pp. 113-15):

"Q. (by Mr. Dwight). Mr. Hirasuna, when a car is delivered in your shop, you stated that about 85 per cent of the cars delivered had a seat covering on them that you removed?

A. Yes, sir.

Mr. Kashiwa. Just a minute. You mean non-factory seat cover. Every car has a covering some time.

Q. (by Mr. Dwight). Non-factory seat cover?

A. Yes, sir.

Q. Now, after you removed this non-factory seat covering, was there yet another covering on the seat, material on the seat?

A. Well, I find occasionally there is about two covers on it, these ready-made covers.

Q. I am talking about the condition of the cushion and the lazy back. Now, as it comes from the factory, is there a covering—is that factory covering on your lazy back and your cushion after you have removed this non-factory covering?

A. Yes, sir.

Q. Now, the other 15 per cent of the cars that are delivered to your shop, do they have this factory-made covering on them?

A. Yes, sir.

Q. Do you do anything to that factory-made covering?

A. No, sir.

Q. That is, except vacuum it?

A. Vacuum it and clean it.

The Court. Speak a bit louder, please.

A. Yes, sir.

Q. (by Mr. Dwight). Your job is, then, to put a new and different covering on top of this factory-made covering, is that right?

A. Yes, sir.

Q. And this new and different covering, then, is usually your plastic material?

A. Usually.

Q. Sometimes it is leatherette, sometimes it is fibre?

A. Yes, sir.

Q. But you don't take the factory covering off of the seat?

A. Well, if there is any rips or some kind of damage I usually repair it and cover it. You see, if I take off the factory covers, it is going to be very hard for me to install it because of the cotton in there, it will be all separated from the frame of the cushion.

Q. So what you are dealing with, then, for instance, the front cushion, you are dealing with the front cushion as it came from the factory; you don't change the front cushion, you put a cover on top of it, is that right?

Mr. Kashiwa. Your Honor, that question is unintelligible, puts a cover on it.

The Court. I don't think it is. He can answer it.

Mr. Dwight. Read the question.

(Question read.)

The Court. Do you understand the question?

A. Yes, Your Honor.

The Court. Are you sure? If so, you can answer; if you don't understand it, just say so and he will rephrase it.

A. You mean why, why I had to cover it?

Q. (by Mr. Dwight). My question is not why you have to cover it. Do you put a separate cover over the factory seat without changing the factory seat?

A. Yes.

The Court. In other words, when you get through there are really two pieces of cloth over the padding and the springs?

A. Yes, sir.

The Court. One, the original factory covering and, second, the new one that you put on top of that?

A. Yes, sir."

But it is not true that replacement or addition is not repair. Replacement may be repair. *Fidelity Storage Corp. v. Burnet*, C.I.R. (C.A. Dist. Col. 1932), 58 F.2d 526, 528; *Libby & Blouin, Ltd. v. C.I.R.*, 4 B.T.A. 910, 914; *Westinghouse Electric & Mfg. Co. v. Hesser* (C.C.A. Ky. 1942), 13 F.2d 406, 410; *Micromatic Hone Corp. v. Mid-West Abrasive Co.* (D.C. Mich. 1948), 78 F.Supp. 641, 644, 645; *Elliott & Barry Engineering Co. v. Baker*, 114 S.W. 71, 73, 134 Mo. App. 95. And, further, addition may

be repair. See *Garland v. Samson* (C.C.A. 8, 1916), 237 F. 31. It is there stated:

“The word ‘repair,’ as defined by Webster’s New International Dictionary, means:

‘Act of repairing; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc.; supply of loss; reparation; mending.’

With this meaning the word has been practically applied by the courts in the construction of statutes and contracts. (Citation of numerous cases follows.)

On the other hand, the word ‘improvement’ is defined by Webster’s New International Dictionary as: ‘A valuable *addition* or betterment, as a building, clearing, drain, fences, etc., on land.’ The word ‘improvement’ is a broader word than ‘repair,’ but *includes the latter*. This word has been practically applied by the courts in accordance with this definition in *Minneapolis Plumbing Co. v. Arcade Inv. Co.*, 124 Minn. 317, 145 N.W. 37; *N.W. Lumber & Wrecking Co. v. Parker*, 125 Minn. 107, 145 N.W. 964; *Arnhold v. Klug*, 97 Kan. 576, 155 Pac. 805; *Parker v. Wulstein*, 48 N.J.Eq. 94, 21 Atl. 623; *Buttenbrock v. Miller* (Ind.) 112 N.E. 771; *Meyer v. City St. Improvement Co.*, 164 Cal. 645, 130 Pac. 215; *South Park Commissioners v. Wood*, 144 Pac. 1087; *Walker v. Tillis*, 188 Ala. 313, 66 South. 54, L.R.A. 1915A, 654; *O’Neil v. Lyric Amusement Co.* (Ark.) 178 S.W. 406; *A. Leschen & Sons Rope Co. v. Moser* (Tex.Civ.App.) 159 S.W. 1018; *City of Roswell v. Bateman*, 20 N.M. 77, 146 Pac. 950; *In re Howard Laundry Co.*, 203 F. 445, 121 C.C.A. 555.” (Emphasis supplied.)

The test, therefore, is not whether there is replacement or addition. To the contrary, it appears from the cases that there is no satisfactory test in determining whether a given operation is manufacture or repair. To be sure, none of the cases in the *Clawson & Bals* line have attempted to lay down a test or rule such as that proposed by the learned judge below. It is submitted that the primary inquiry is still whether the process is essentially one of production or whether it is for the purpose of restoring the article of another to its normal condition. See *Clawson & Bals v. Harrison* (C.C.A. 7, 1939), 108 F.2d 991. Furthermore, “. . . the question whether the process is essentially one of production or merely of repair is to be resolved by an overall view of taxpayer’s activities . . .” *U. S. v. J. Leslie Morris Co.* (C.C.A. 9, 1942), 124 F.2d 371, 372. And the taxpayer’s activities must be viewed from the “standpoint of production and distribution in the trade.” *Clawson & Bals v. Harrison*, *supra*. These are the guides.

At this point, the facts become important. The writer therefore directs the attention of this Court to the entire testimony of appellant (Tr. pp. 87-129) and especially to the following (Tr. p. 126):

“The Court. Yes. In other words, most of the cars that come to him are worn out with respect to the factory covers, but sometimes he gets brand new cars to have seat covers put on. Is that a fair statement?

A. Yes, sir.

Q. (by Mr. Kashiwa). Now, with relation to these factory covers which are worn out, would it



be advisable to remove those factory covers? What would happen if you removed that?

The Court. Which question do you want answered? One question at a time.

Mr. Kashiwa. Well, let's take the first one.

A. You mean just what you said right now? Mr. Kashiwa. Well, I will rephrase it here.

Q. With relation to these cars where the factory cover shows cotton, you can see it from the top, now with relation to that type of condition what would happen if you removed that factory cover?

A. Well, if we removed the cover, we are going to have a difficult time to install the covers because it is just going to come off, to pieces.

Q. What will come off?

A. The measurements, the wadding, I mean the padding and everything. We do at times upon customer's request, but we charge extra for that because of the difficulties."

In analyzing the facts, it must be kept in mind that revenue statutes should be given a practical and workable construction (*Rullen v. Buscaglia* (C.C.A. Puerto Rico 1948), 168 F.2d 401, 403, cert. den. 335 U.S. 857, 69 S.Ct. 131; *Richard T. Green Co. v. City of Chelsea* (C.C.A. Mass. 1945), 149 F. 2d 927, 931, cert. den. 326 U.S. 741, 66 S.Ct. 54); and that in the construction of such statutes substance, not form, controls (*C.I.R. v. Strong Mfg. Co.* (C.C.A. 6, 1941), 124 F.2d 360, 364, reversed on other grounds *Helvering v. Strong Mfg. Co.*, 317 U.S. 102, 63 S.Ct. 103; *Sanborn v. C.I.R.* (C.C.A. 8, 1937), 88 F.2d 134, 137, cert. den. 301 U.S. 700, 57 S.Ct. 930). Useless acts are not re-

quired. See: *Rose, C.I.R. v. Haverty Furn. Co.* (C.C.A. 5, 1926), 15 F.2d 345, 346.

It is therefore submitted that the process of making seat covers in the case at bar, viewed in its entirety and from the standpoint of production and distribution in the trade, was essentially for the purpose of restoring the original condition of the seats and hence constituted repair and not manufacture. It has been so held in *John J. Roche Co. v. Eaton* (D.C. Conn. 1926), 14 F.2d 857. See also: *In Re Burkhead*, supra, and *Martin Tire Co. v. U.S.* (D.C. Fla. 1955), 130 F.Supp. 316.

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#### IV.

##### APPELLANT'S LABOR FOR CHALKING, MARKING, CUTTING AND SEWING WAS AN INSTALLATION CHARGE.

“Section 316.8. Basis of tax on sales, generally. (a) The tax is imposed on the sale by the manufacturer of any of the articles enumerated in the regulations in this part. The provisions of law embody the rules for determining the sale price, which is the basis of the tax, except in cases covered by section 3441(b) (see section 316.15). In general, this should be the manufacturer's actual price at the point of distribution or sale. In determining the sale price, for tax purposes, there shall be included any charge incident to placing the article in condition packed ready for shipment. There shall be *excluded* (1) the amount of the tax, whether or not billed as a separate item, and (2) (subject to the provisions of section 316.12) transportation, delivery, insur-

ance, *installation*, or other charges (not required by the preceding sentence to be included).” 26 C.F.R. 316.8(a) (emphasis supplied). Plaintiff’s Ex. “F”.

The Transcript of Proceedings (Tr. p. 122) establishes that the price of the covers includes cost of labor and material and that the charge for labor is charge for installation.

“Q. (by Mr. Kashiwa). Now, with relation to the price of the covers you quoted, that includes the cost of the material, am I right, the cost of the material to you?

A. Yes, sir.

Q. And also all of the labor?

A. Yes, sir.

Q. The installation labor?

A. Everything.

Q. Now, roughly speaking, breaking that down, let’s say for a \$25 job, what per cent would you say is the cost of material?

A. I’d say about two-thirds.

Q. Two-thirds. And the other third is—

A. Labor.

Q. —labor. Now, by labor you mean the labor used to initially mark the article, cut it, sew it and then put it on the car, am I right?

A. Yes.

Q. Do you also include the labor of taking the seats out of the car?

A. Yes, sir.

Q. All of that is included?

A. Yes, sir.”

That the cost of labor is an installation charge is further seen in that every act in the chalking, mark-

ing, cutting, and sewing is performed with the intention of immediate installation. To illustrate, take the process of covering the cushion (Tr. p. 94):

“Q. . . . Now with relation to the covering of the seat and the lazy back, will you tell us exactly how it is done after the car arrives at your place of business?

A. You mean the cushion and the lazyback?

Q. Yes.

A. Everthing?

Q. Well, let's take the cushions first. You tell us exactly how it is done.

A. Well, we take the cushion out of the car and measure it. You see, the cloth is about 64 inches, the width is enough, so we measure the width of the cushion and cut it and we lay the cloth on top of the cushion and pin it on the corner and pull it tight. We pull it as tight as possible. We mark it around the edge where we are going to sew it.

Q. What do you mark it with?

A. We mark it with chalk. And we cut another piece of cloth which is called facing underneath here, in sections, you see, and we mark it here, try to take all the wrinkles off from the cloth, and we mark it and we cut it with the scissors, and we lay it on the machine and we sew a piping, that is a welt, a white welt, along the edge of the chalk, and we sew the facing and the seat cover together.

Q. Then what do you do after you are through sewing?

A. Well, I vacuum clean the cushion and see if there is any springs broken, and if there is we usually put a new spring in it, and we pad all

the corners with wadding, thin cotton, you know, and we install it."

Every act in the process, then, is performed not with the intention of putting out the cover for sale in the general market, but with the idea of immediate installation. The charge for labor, being a charge for installation, must be excluded in determining the basis of the tax. What we have in the final analysis is a sale of material, or bare cloth only.

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## V.

### APPELLANT'S SEAT COVER BEFORE INSTALLATION NOT A PRODUCT COMMONLY OR COMMERCIALY KNOWN AS A "PART OR ACCESSORY".

Subsection (b) of 26 C.F.R. sec. 316.55 requires that an article, before it can be denominated a "part or accessory" must have reached such a stage of manufacture that it is *commonly or commercially* known as a part or accessory whether or not fitting operations are required in connection with installation.

The writer submits that the covers, after being cut and sewn but before installation, cannot be deemed at law to have reached such a stage of manufacture that they are commonly or commercially known as "parts or accessories". The uncontradicted testimony of appellant in the trial court below (see transcript) substantiates the writer's contention.

First of all, appellant testified that the covers before installation are not recognizable and cannot be sold on the market as such (Tr. p. 124):

“Q. Now, have you at any time seen covers of the type you make sold on the market as an auto part?

A. No, sir.

Q. Why couldn't it be sold on the market?

A. I think it cannot be, because when you compare two covers, a ready-made and our covers, our covers look—are really sloppy, you just can't make head or tails on them, because you just got to know how to install it. But ready-made covers, they have all the facilities, such as they have a rope or grommet tacked onto the facing cloth which you could tie it with a rope, you know, and they have springs that you could hook it onto the cushion, and they have instructions, they have a pin—they usually use pins on it, on the back of the covers.”

Secondly, and at the same time, he further testified that the covers to the cushions and lazybacks are expertly cut and sewn to fit the particular cushion or lazyback, so that the installation of such covers demands the attention of a skilled and experienced person in the trade (Tr. p. 120):

“Cross-examination by Mr. Dwight:

Q. And when you have completely finished sewing you have a piece of cut and fitted and sewn material ready to be put on——

A. Yes, sir.

Q. ——to the cushion or lazyback?

A. Yes, sir.

Q. It is for all intents and purposes when you have reached that point, all that is left then is to pull it tight and to hook it on with your hog-rings and however else you stick it on?

A. Well, it couldn't be installed by an inexperienced man because it looks like a bag, a sack or bag. It is not—you just——

Q. However, it is, as far as you are concerned expertly cut to fit this particular cushion or lazy-back?

A. Yes, sir.

Q. And it is made to fit the cushion. And actually, then, with experienced personnel it is pulled to fit the seat?

A. Yes. Well, we have——

Q. And connecting material, whether it is tacking or whether it is a hog-ring is put in to hold it onto the cushion or lazyback?

A. And there is a lot of tricks and know-how involved in it.

Mr. Dwight. No further questions."

Finally, the uncontradicted testimony is that the cover is not usable for any other car than that for which it was made (Tr. p. 121):

"Q. Now, this material which is sewn together whether it is for the cushion or for the lazyback, is that good for any other car?

A. No, sir.

Q. It is made for——

A. That particular cushion.

The Court. Well, just a minute, if it is made, for example, for a 1955 Chevrolet cushion, wouldn't it fit all of that model and that year?

A. Well, it will fit, but it won't fit evenly. What I mean is, I would be ashamed of it, to install another cover that is taken from another car pattern, because cushions are not all alike.

The Court. They do vary?

A. I have tried before, but it doesn't work. What I mean is, purely from the standpoint of a tailor-made cover.

The Court. Is that because of the way cushions are worn by the time they reach your shop?

A. Yes, sir.

The Court. Some are worn more than others and take different shapes?

A. Take a 250-pound man, really break the cushion of it. It is really a different size altogether."

It may be that a ready-made seat cover is a "part or accessory", but the covers made by appellant herein are clearly different. Besides the differences stated in appellant's testimony above, appellant's covers differ in the following respects: (1) Different designs of covers are made, which designs are designated by the customer. (Tr. p. 101.) (2) In most cars, the front and rear cushion and the front and rear lazyback are covered separately. (Tr. pp. 94-100.) (3) In General Motors cars, the front and rear cushion and the front and rear lazyback are detached before the covers are made. (Tr. pp. 110-111.) (4) The covers are never made to be kept in stock. (Tr. p. 108.)

On the basis of the foregoing, it is submitted that the covers made by appellant in the case at bar did not reach such a stage of manufacture that they were commonly or commercially known as "parts or accessories".



## VI.

CONTRACTS FOR LABOR AND MATERIALS ARE DISTINGUISHED FROM CONTRACTS OF SALE AND ARE NOT WITHIN THE CONFINES OF THE REVENUE STATUTE.

In the case of *John J. Roche Co. v. Eaton* (D.C. Conn. 1926), 14 F.2d 857, 858, the court had before it for construction, section 900, title 9 of the Act of February 24, 1919. The relevant parts of said section read as follows:

“That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

“(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

“(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof, except tractors, 5 per centum;

“(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.”

As to said section, the court held:

“It will not be questioned that a distinction exists between a contract of sale and one for work and materials. The distinction is not recent. It

was recognized long anterior to the passage of the act of 1919. I will not assume that Congress was ignorant of its existence, and that, in the use of language having definite and ascertained legal connotations, it intended to disregard them. The notion or theory that, because the statute applicable is a taxing statute, its language was destined for lay persual and devised for a lay interpretation, is a trifle overingenious. The law emanating from Congress is always addressed to all of the people. Rules of statutory construction do not vary in accordance with the assumed learning or intelligence of the class which in any given instance is specially affected by the legislation.

“I hold that the dominant aspect of the transactions engaged in by the plaintiff was that of work performed. Materials were, of course, supplied; but the fact that these materials were not manufactured en masse, but were fashioned specially in each instance for a specific customer, makes the furnishing of them but an incident of the major transaction. While the line of demarcation between a contract of sale and one for services and material is often elusive, that is not a consideration which impugns the validity or the reality of the distinction.

“I therefore hold that the parts or accessories (assuming that they are such) were not sold by the plaintiff within the intendment of the statute.  
 . . .”

The same section was reenacted in substantially the same form in the Revenue Act of 1939, as amended, and reads:

“There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

“(a) Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 8 per centum, except that on and after April 1, 1955, the rate shall be 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this section, be considered to be a sale of the chassis and of the body.

“(b) Other chassis and bodies, etc. Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 10 per centum, except that on and after April 1, 1955, the rate shall be 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

“(c) Parts or accessories (other than tires and inner tubes and other than radio or television receiving sets) for any of the articles

enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1955, the rate shall be 5 per centum." 26 U.S.C.A. section 3403.

This section was interpreted along the same line as in the *John J. Roche Co.* case, *supra*, in *Johnnie & Mack, Inc. v. U. S.* (D.C. Florida 1954), 123 F. Supp. 400, wherein the court held: "The sales of seat covers are sales of labor and materials and are not sales of seat covers as accessories," "regardless of whether the purchaser is an individual automobile owner or is a new or used car dealer."

The District Courts do not seem to be alone in drawing the distinction. It appears that the Treasury regulations also make the distinction. In 26 C.F.R. 316.5, it is provided:

"Section 316.5. When tax attaches. (a) In general the tax attaches when the title to the article sold passes from the manufacturer to a purchaser.

"(b) When title passes is dependent upon the intention of the parties as gathered from the *contract of sale* and the attendant circumstances. In the absence of expressed intention, the legal rules of presumption followed in the jurisdiction where the *sale* is made govern in determining when title passes. Generally, title passes upon delivery of the article to the purchaser or to a carrier for the purchaser." (Emphasis supplied.)

Two things must be noted in the regulation above: (1) The reference is to the law of sales. (2) No provision is made as to when title passes in a contract

for labor and materials. These points are material and essential for the reason that, at common law and under the Uniform Sales Act, the great weight of authority holds, as a matter of law, that contracts for labor and materials are not contracts of sale. The rule is well stated in *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men* (Sup. Ct. Wash. 1949), 209 P.2d 358, 361, 34 Wash. 2d 553. The court there held as follows:

“The common law recognized the distinction between contracts to sell and contracts for work, labor and materials. Some of the courts and text writers are of the opinion that section 5 of the Uniform Sales Act, Rem. Rev. Stat. sec. 5836-5, which gives legal effect to contracts for ‘future goods’ as contracts to sell, eliminates that distinction. The case authority on either side of this proposition is scant and divided. See Annotation, 111 A.L.R. 341. However, we believe it to be the better rule that the Act does not purport to include within its purview contracts for work, labor and materials. In a sound analytical opinion, the Utah court sets forth the reasons for this rule in the case of *Sidney Stevens Implement Co. v. Hintze*, 92 Utah 264, 67 P.2d 632, 635, 111 A.L.R. 331, wherein a contract to construct a trailer especially for a traveling salesman, which was not readily salable to others in the manufacturer’s regular course of business, was held to be a contract for work, labor and materials, and not a contract to sell. In construing secs. 5, *supra*, and 76 (defining future goods) of the Act the court said: ‘. . . If, as a matter of law, a contract is one for work, labor and materials, it is not a contract of sale and consequently would not come within

the definitions contained in secs. 5 and 76. These two sections, therefore, do not contain any new rule expanding the law of sales to include within its purview a transaction which is not a "contract to sell," nor does the act contain any definition of a "contract to sell" which enlarges its scope so as to eliminate the distinction, existing before the creation of the Uniform Sales Act, between a contract of sale and a contract for work, labor, and materials. We fail to see, therefore, how sections 5 and 76 of the Sales Act can apply to a contract involving, not a "contract to sell," but a contract involving the manufacture of something especially for the buyer and not readily salable to others in the manufacturer's regular course of business, if such a contract cannot be said to be a contract to sell when made, but must be considered a contract for work, labor, and materials.'

"As the reasoning of the Utah court indicates, there must be a 'sale' or a 'contract to sell' before the Act will apply to a given transaction. It is not the purpose of the Uniform Sales Act to bring within its scope every transaction involving a change in possession or ownership of chattels. The Act itself, in sec. 73, Rem. Rev. Stat. sec. 5836-73, recognizes that there are cases which are not provided for in the Act and stipulates that such cases shall be governed by the general principles of law and equity. Sound reasoning supports the rule that a contract for work, labor and materials is just such a case and is therefore not within the confines of the Act."

See: *Sidney Stevens Implement Co. v. Hintze*, 67 P.2d 632, 635, 92 Utah 264. See also: *Rino v. State-*

*wide Plumbing & Heating Co.*, 262 P.2d 1003, 1005, 74 Ida. 374; *Foley Corp. v. Dove*, 101 A.2d 841, 842, (Dist. of Columbia); *Perlmutter v. Beth David Hospital*, 123 N.E.2d 792, 793, 308 N.Y. 100; *Racklin-Fagin Const. Corp. v. Villar*, 281 N.Y.S. 426, 427, 156 Misc. 220; *Carlson, Holmes & Bromstad v. M. I. Stewart & Co.*, 264 N.Y.S. 277, 279, 147 Misc. 607, *affd.* 283 N.Y.S. 430, 246 App. Div. 522; *United Iron Works v. Standard Brass Casting Co.*, 231 P. 567, 568-9, 69 Cal. App. 384. See also: 77 C.J.S. sec. 2, P. 584, "Sales". The reference to the law of sales, then, indicates that the Department of Treasury in issuing said regulation could not have ignored the distinction between contracts of sale and contracts for labor and materials; and the omission of contracts of the latter type from the provisions of the regulation must be deemed a recognition of the fact that such contracts for labor and materials do not come within the purview of the revenue statute in question here. This seems to be conclusive in view of 26 C.F.R. 316.8, which provides:

"Section 316.8. Basis of tax on sales, generally.

(a) The tax is imposed *on the sale* by the manufacturer of any of the articles enumerated in the regulations in this part." (Emphasis supplied.)

And the term "sale" is defined in 26 C.F.R. 316.1(f) as "an agreement whereby the seller transfers the property (that is, the title or the substantial incidents of ownership) in goods to the buyer for a consideration called the price, which may consist of money, services, or other things." This is substantially the same definition given to the term "sale of goods" in

Section 1 (2) in the Uniform Sales Act. The conclusion is obvious in view of *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men*, *supra*, and the cases following:

The following must be kept in mind in considering the Treasury regulations: First, a Treasury regulation consistent with the statute has the force and effect of law. See: 26 U.S.C.A. section 3450; *Maryland Casualty Co. v. U. S.*, 251 U.S. 342, 349, 40 S.Ct. 155, 157; *Pacific Nat. Bank v. C. I. R.* (C.C.A. 9 1939), 91 F.2d 103, 105; *Crocker v. Lucas* (C.C.A. 9 1930), 37 F.2d 275, 277; *Douglas County Light & Water Co. v. C. I. R.* (C.C.A. 9 1930), 43 F.2d 904, 905; *Commissioner v. Van Vorst* (C.C.A. 9 1932), 59 F.2d 677, 679; *U. S. v. Public Service Co. of Colorado* (C.C.A. 10 1944), 143 F.2d 79, 81; *Williams v. C. I. R.* (C.C.A. 8 1930), 44 F.2d 467, 468. And, secondly, words and phrases having a technical meaning are construed according to their technical sense. See: *Jones v. Magruder* (D.C. Md. 1941), 42 F.S. 193, 197; *Hines v. Mikell* (C.C.A. 4 1919), 258 F. 28, cert. den.; *Mikell v. Hines*, 250 U.S. 645, 39 S.Ct. 494; *Barber v. Gonsales*, 347 U.S. 637, 641, 74 S.Ct. 822. See also: Sutherland, *Statutes & Statutory Construction*, 3rd ed., Callaghan & Co., Chicago, 1943, V.III (sec. 5304), V.II (sec. 4007).

For State decisions applying the distinction to State revenue statutes, see: *Samper v. Indiana Dept. of State Revenue*, 106 N.E.2d 797, 231 Ind. 26; *Gross Income Tax Div. of State v. W. B. Conkey Co.*, 90 N.E. 2d 805, 228 Ind. 352; *Singing River Tire Shop v. Stone*, 21 So.2d 580 (not reported in state reports).



The test in the law of sales as to whether a particular transaction is a contract of sale or a contract for labor and materials is stated in 77 C.J.S. section 2, 'Sales'', at page 585:

“Whether a contract is one for the sale of goods, or for work and labor to be rendered may depend on whether the primary intent is merely to provide for the delivery of goods, or whether the essential consideration is work and labor to be performed at the employer's instance and for his use rather than for the producer's benefit. The distinction has been made that, if the property is not such as the seller usually has on hand for sale and in existence at the time of the sale, but is made specially for the buyer and on his special order, the contract is one for work and labor and not of sale; but that if the property ordered is exactly such as the seller makes and keeps on hand for sale to anyone, and no change or modification of it is made at the buyer's request, it is a contract of sale, even though it may be entirely made after, and in consequence of, the buyer's order for it.”

See also: *Crystal Recreation, Inc. v. Seattle Ass'n of Credit Men*, supra, and cases following. See also: *Schroeder v. Cedar Rapids Lodge No. 304*, 49 N.W.2d 380, 242 Ia. 1297; *Adams v. Cohen*, 136 N.E. 183, 242 Mass. 17; *Bond v. Bourk*, 129 P. 223, 54 Colo. 51; *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256.

That the sales of seat covers in the case at bar come within the four corners of the rule of test stated above,

is attested to by the cases cited, *supra*, and confirmed by *John J. Roche Co. v. Eaton* and *Johnnie & Mack, Inc. v. U. S.*

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## VII.

### DOUBT MUST BE RESOLVED IN FAVOR OF APPELLANT.

The conclusion seems to be inescapable that appellant, in the case at bar, is not subject to tax, in that he was not a "manufacturer" and did not sell "parts or accessories" within the intendment of the statute. If, however, all prior arguments for some reason should be rejected, the writer contends that ultimately this case must be disposed of in accordance with the fundamental and well-settled rule of construction that all doubts must be resolved in favor of taxpayers. (The rule is stated and citations given in Argument I of this brief.)

That there exists a real and substantial doubt in the construction of the statute here in question is evidenced by the manifest confusion and instability of thinking of the Bureau itself, a body of expert men in the field of taxation. It was seen that the published rulings prior to August 18, 1952, logically lead to the conclusion that the sale of seat covers in the case at bar is not subject to tax, regardless of whether the sale is to individual automobile owners or to new or used car dealers. On August 18, 1952, however, the Bureau issued a public ruling reversing the trend of prior published rulings. Said public ruling refers to certain private rulings, the existence, number, time of

issuance, and contents of which, it may be noted incidentally, is nowhere in evidence in the proceedings below and which still remain a mystery, as stated previously. These private rulings, according to the published ruling of August 18, 1952, provided that sales of seat covers to individual automobile owners were not subject to tax, while those to new or used car dealers were subject to tax. Apparently, at this time and contrary to prior published rulings, the Bureau was of the opinion that there was a distinction between individual owners and new or used car dealers based on consumption. (The word "consumption" appears nowhere in the statute or regulations.) This distinction was discarded, and sales of seat covers to new or used car dealers, as well as those to individual automobile owners, were made subject to tax in said published ruling of August 18, 1952. Therefore, the thought process of the Bureau ran along the following lines: (1) Sales of seat covers specially made are not taxable, regardless of whether the purchaser is an individual owner or a new or used car dealer. (2) Sales of seat covers specially made and sold to individual owners are not taxable, while those to new or used car dealers are taxable. (3) Sales of seat covers specially made are taxable, nevertheless, regardless of whether the purchaser is a new or used car dealer. Certainly, this is confusion and instability of thought. The meaning of words do not change in such a short span of time. What better evidence is there of a real and substantial doubt, than the confusion and instability of thinking of an expert body of men?

It is respectfully submitted, therefore, that this court has no alternative, if it rejects all prior arguments, but to apply the rule and find for the appellant. The rule must not be reduced to ashes, to meaningless verbiage. It is the only beacon when the legal mind is without the guide of precedence and becomes enshrouded in doubt.

---

### CONCLUSION.

It is respectfully submitted that the judgment of the District Court below be reversed by this court and an appropriate order entered in conformity with this decision.

Dated, Honolulu, Hawaii,  
March 17, 1956.

Respectfully submitted,  
SHIRO KASHIWA,  
*Attorney for Appellant Masao Hirasuna.*

*On the Brief:*

GENRO KASHIWA.

**In the United States Court of Appeals  
for the Ninth Circuit**

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**MASAO HIRASUNA, Doing Business as Mike's Auto Top  
Shop & Upholstery Shop, APPELLANT**

*v.*

**S. V. McKENNEY, District Director of Internal  
Revenue, APPELLEE**

---

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF HAWAII**

---

**BRIEF FOR THE APPELLEE**

---

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**FILED**

**MAY 15 1956**



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**In the United States Court of Appeals  
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No. 14995

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*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT OF HAWAII*

---

**BRIEF FOR THE APPELLEE**

---

**OPINION BELOW**

The opinion of the District Court (R. 50-60) is reported at 135 F. Supp. 897.

**JURISDICTION**

This appeal involves a suit by a resident and citizen of Hawaii for refund of manufacturer's excise taxes imposed under Section 3403 of the Internal Revenue Code of 1939, claimed to have been illegally collected to the extent of \$1,391.92 by the Director on May 30, 1953, who was then the District Director of Internal Revenue for Hawaii. (R. 3-17, 48.) Claims for refund were filed on October 27, 1954. (R. 5-6, 50.)

Taxpayer did not receive by registered mail any formal notice of allowance or disallowance of the refund claims within the time prescribed in Section 6532 of the Internal Revenue Code of 1954, and on May 2, 1955 (R. 17), being more than six months after the filing of the refund claims, taxpayer brought the instant suit in the United States District Court for the District of Hawaii (R. 3-17). Jurisdiction of the District Court exists by virtue of 28 U.S.C., Section 1340. Judgment was entered in favor of the District Director on December 8, 1955. (R. 60-61.) Notice of appeal to this Court was timely filed on December 21, 1955, by taxpayer within sixty days. (R. 62.) Jurisdiction of this Court to hear and determine this appeal is conferred by 28 U.S.C., Section 1291.

#### QUESTIONS PRESENTED

1. Whether the District Court erred in holding that taxpayer was a "manufacturer" of automobile seat covers within the meaning of that word in Section 3403 of the Internal Revenue Code of 1939.

2. Whether the District Court erred in holding that taxpayer's sales of automobile seat covers were sales of automobile "parts or accessories" within the meaning of those words in Section 3403 of the Internal Revenue Code of 1939.

#### STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the statute and other authorities involved are set forth in the Appendix, *infra*.

#### STATEMENT

This suit was brought in the District Court for the District of Hawaii for refund of manufacturers' excise taxes assessed against and paid by taxpayer in the

amounts of \$348.78 for 1949, \$410.24 for 1950, \$491.63 for 1951, and \$516.05 for 1952, totaling \$1,766.70, plus interest. (R. 4, 6.) The parties stipulated as follows:

Taxpayer at all times has been a resident and citizen of the Territory of Hawaii. (R. 43-44.) Appellee is a resident and citizen of Hawaii and was during the years 1953, 1954 and until September 1, 1955, the sole District Director of Internal Revenue for the District of Hawaii and was fully authorized to collect taxes due the United States from all taxpayers in Hawaii, especially taxes due under Section 3403 of the Internal Revenue Code of 1939. (R. 49-50.) At all times material taxpayer operated a business under the style of "Mike's Auto Top and Upholstery Shop" in Honolulu. During the early part of 1953 the District Director through his agents made assessment against taxpayer in the total amount of \$1,766.70 for taxes claimed to be due from taxpayer as a manufacturer within the meaning of Section 3403 of the Internal Revenue Code of 1939,<sup>1</sup> as set forth in detail in the schedules forming part of the stipulation. (R. 44-47.)

It was also stipulated that \$374.78 was properly assessed, leaving the amount of \$1,391.92 of the taxes collected in dispute (R. 48) and that this latter amount consists of sums assessed against sales to used-car dealers of custom-made seat covers only (R. 48, 51). The parties further agreed that the amount of \$1,391.92 is the proper assessment for the period in question if the custom-made automobile seat covers are automobile accessories and manufactured or produced as contemplated by Section 3403 of the Internal Revenue Code. (R. 48, 51.)

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<sup>1</sup> References below to Code or Internal Revenue Code, unless otherwise noted, are to the Internal Revenue Code of 1939.

Taxpayer fully paid the assessment in the amount of \$1,766.70 to the District Director on May 30, 1953. (R. 48.) On October 27, 1954, taxpayer regularly filed with the District Director four claims for refund for each of the periods above mentioned. (R. 50.)

Trial was held by the court without a jury (R. 51) and evidence, both oral and documentary, was introduced. (R. 61, 65-130). The District Court made the following findings of fact:

During the period from January 1, 1949, to August 31, 1952, taxpayer was engaged in the business of covering automobile seats. The materials used were kept in stock in roll form, at taxpayer's place of business, in large quantities and various types, quality and colors. Customers desiring their car seats covered brought their cars to taxpayer's place of business and after selecting the type, quality and color of materials to be used left their cars. The customers designated the seats or parts of them to be covered. Taxpayer took measurements, cut and sewed the material and installed it by tacking it to the car seat. (R. 51-52.)

Further undisputed details with respect to taxpayer's operations appear from the testimony given at the trial as follows:

Taxpayer started in 1935 as a mechanic and has from that time worked in garages on automobiles. (R. 124.) During the tax years in question he was the sole proprietor of "Mike's Auto Top and Upholstery Shop" in Honolulu. (R. 87-88.) His shop was located in a building at the rear of a used-car lot (R. 88) where he was engaged in the business of covering the seats, tops and inside upholstery of automobiles (R. 92-93). This case is concerned only with the nature of his operations

in covering automobile seats. As to this phase of his business, 99 per cent of his orders came from used-car dealers. (R. 93.) And, as already noted, it is stipulated that this case is concerned only with the sales to used-car dealers. (R. 48, 51.) His shop was located in a used-car lot area and he had a working relationship with several dealers whereby they would phone him when they had two or three cars for him to work on, describing the pattern of seat cover and type of material to be used on each. (R. 93, 117-118.) He would then pick up the car, bring it to his shop for the fitting, and return it to the dealer when the job was completed. (R. 94.)

So as to be able to fill any order, taxpayer kept an inventory of bolts or rolls of material of various patterns and colors. (R. 89.) The portion of the seat which forms the back-rest is called the "lazyback", and the portion on which one sits is called the "cushion". (R. 94.) The way in which taxpayer covered the cushions and lazybacks was essentially as follows:

The front cushion was removed from the car and measured. The cloth or covering was then measured roughly to the cushion top dimensions, and cut. It was then laid on the cushion, pulled tight, and pinned temporarily so that a chalk mark could be made around the edge where it was to be sewed. Another piece of cloth called the facing was cut with the scissors, the wrinkles removed, and then sewed to the under side of the covering by machine. Other portions of the cushion were fitted out similarly, and the various pieces of material were then sewn together and piping sewn at all seams. At this point the material had been expertly cut and sewn so as to fit a particular cushion, and would not be usable except on the cushion intended.

(R. 94-96, 111, 119-121.) If the seat had a non-factory seat cover, it was removed. (R. 96.) Factory seat covers were never removed because otherwise the cotton would become separated from the frame making it very difficult to install the new cover. (R. 114.) The cushion was then vacuumed, padded with wadding if necessary (R. 95), and the new cover pulled on and attached with tacks or hog rings (R. 96, 120-121).

The rear cushion and the lazybacks were covered in the same manner except that an additional operation was generally performed on the lazybacks. A border of plastic or woven plastic was sewn along the top as a trim. This border was cut and fitted in the same way as the cover and facing. (R. 98, 120.)

In those cars which had a movable arm rest in the center of the rear lazyback the procedure was different in that the back had to be taken out and three separate covers cut and sewn together. (R. 100, 103.)

In the course of covering the seats taxpayer replaced broken springs with new ones (R. 95), and did any necessary welding (R. 104). Extra charges were assessed the customer for such items. (R. 104.) Taxpayer usually repaired rips in the factory seat covers (R. 114), but without charge because the dealers gave him so much business (R. 110). The price for the seat covers included only the labor and material used in making and installing them. (R. 109, 122-123.)

Working with his one employee, taxpayer could turn out two to five cars a day depending upon the pattern, trim work and type of material used. (R. 89, 109.) The customer would select the pattern and design (R. 101), and the price would depend upon the material used (R. 104). Approximately two-thirds of the cost of any job was the cost of material, the remaining one-

third comprising the labor expended in taking the seats out, measuring, cutting, and sewing the material, fitting the finished cover to the seats, and affixing the seats in the car again. (R. 122-123.) In arriving at the assessment the Commissioner allowed as a deduction from the sales price an amount representing the labor cost attributable to installation. (R. 26, 45-47.)

In any event, as already noted, it is stipulated that the amount of \$1,391.92 is the proper assessment if the custom-made automobile seat covers are automobile accessories and manufactured or produced as contemplated by Section 3403 of the Code. (R. 48, 51.)

For reasons stated in its opinion (R. 52-60), the District Court decided this issue in the affirmative.<sup>2</sup>

#### SUMMARY OF ARGUMENT

The automobile seat covers were properly taxed as automobile parts or accessories sold by the manufacturer within the meaning of Section 3403 of the Internal Revenue Code of 1939. Clearly they were parts or accessories within the meaning of long-standing Treasury Regulations which have been upheld by the Supreme Court. The improved seats are component parts of an automobile; they were designed to be attached or used in connection with the automobile to add to its utility or ornamentation and they are articles the primary use of which is in connection with the automobile, whether or not essential to its operation or use. Moreover, that the seat covers fall within any

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<sup>2</sup> Prior to the trial below the District Court had granted summary judgment in favor of the District Director (R. 35-36) but on taxpayer's motion vacated the order of summary judgment (R. 42-43) and set the case down for trial. However, after hearing the witnesses the court again concluded that the District Director was entitled to judgment. (R. 131.)

one of these categories is sufficient. Besides, these articles reached the stage of manufacture in which they were commonly or commercially known as parts or accessories. Although the clause of the Regulations making this provision is not to be read as restricting the other categories, the seat covers in any event fully comply with its terms.

Again there can be little question that the process employed by taxpayer, whereby seat covers were produced in his shop by the application of machinery and skilled labor to raw materials supplied by him, was manufacturing and that the final result was a manufactured article. The used-car dealers who were here the purchasers were not the manufacturers. On the contrary, taxpayer supplied everything — material, labor and the finished article. Title to the material was undoubtedly taxpayer's until the seat cover was completed by him. To assert that taxpayer was merely a repair man is to fly into the face of the undisputed facts.

Plainly these articles manufactured by taxpayer from goods to which he alone had title were sold to his customers, the used-car dealers, when he passed title to the completed seat covers. No more is required to satisfy the terms of Section 3403 and to make the transaction taxable. Provisions of the Internal Revenue Code are here in question; technical distinctions between contracts for work, labor, and materials and contracts to sell, or sales within the purview of the provisions of the Uniform Sales Act are entirely irrelevant. The transaction here falls completely within the meaning of Section 3403 of the Internal Revenue Code and that is all that is required for imposition of the tax.



The administrative position with respect to taxability of sales of automobile seat covers to dealers has at all times been consistent; such sales have at all times been ruled taxable. Even though for a period the Internal Revenue Bureau had issued rulings that the tax did not apply when the seat covers were individually designed by the manufacturer for an automobile belonging to the consumer of the seat covers (and not for resale), this cannot affect the instant situation where sales to dealers are involved and which have always been held taxable. Moreover, sales of seat covers to consumers are now also held taxable and the prior rulings in those cases are no longer followed. Taxpayer shows no reliance on any such rulings nor plainly could he. In any event the Commissioner is not precluded from changing his rulings and is not bound by his own or his predecessors' prior mistakes of law.

#### ARGUMENT

**The Automobile Seat Covers Were Properly Taxed as Automobile Parts or Accessories Sold by the Manufacturer or Producer Within the Meaning of Section 3403 of the Internal Revenue Code of 1939**

#### *A. Introduction*

Section 3403 of the Internal Revenue Code of 1939 (Appendix, *infra*) provides as follows:

#### SEC. 3403. TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax \* \* \*:

(a) Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus

bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof) \* \* \*

(b) *Other Chassis and Bodies, Etc.*—Other automobile chassis and bodies, chassis and bodies for trailers and semi-trailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof), except tractors \* \* \*.

(c) Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b) \* \* \*.

\* \* \* \*

The taxpayer claims his operations during the tax years were not taxable under Section 3403 for four reasons:<sup>3</sup>

(1) He contends that the seat covers he made were not “parts or accessories” within the meaning of subsection (c) as defined by Treasury Regulations 46, Section 316.55 (Appendix, *infra*).

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<sup>3</sup> Section 3403, as quoted above, incorporates amendments effective on and after November 1, 1951, none of which, however, are material to the issues here involved. See Appendix, *infra*. For purposes of this appeal the language of the section may be regarded as substantially the same during the entire period in question.

(2) He contends further that he was not a “manufacturer” or “producer” of seat covers within the meaning of those words in Section 3403 as defined by the courts and Regulations 46, Section 316.4 (Appendix, *infra*).

(3) He contends that there were no contracts of sale made by him.

(4) He claims that the assessments contravene the rulings of the Bureau of Internal Revenue in effect during the tax years.

We shall discuss each of these contentions.

### B. *Parts or accessories*

Regulations 46, Section 316.55, define “parts or accessories” as follows:

SEC. 316.55 *Definition of parts or accessories.*—The term “parts or accessories” for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term “parts and accessories” shall be understood to embrace all such articles as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. \* \* \*

\*

\*

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2

The seat covers manufactured by taxpayer were parts or accessories under all three subdivisions of Section 316.55. Within the meaning of subdivision (a) the seat covers certainly were intended to, and did "improve" the seats, which are "component" parts of an automobile. It cannot be disputed that the seat covers were articles "designed to be attached to or used in connection with \* \* \* [an automobile] to add to its utility or ornamentation" under subdivision (b). Nor can it be denied that the covers were articles "the primary use of which is in connection with such vehicle \* \* \* whether or not essential to its operation or use" under subdivision (c).

It remains only to be seen whether the definition of parts and accessories contained in the Regulations is reasonable and proper. The Supreme Court has said that it is. A definition of such similar language as to be substantially the same as the present Regulations was conclusively approved by the Court many years ago in *Universal Battery Co. v. United States*, 281 U. S. 580. The Court said (pp. 583-584):

The administrative regulations issued under § 900 [cognate of Section 3403] uniformly have construed the term "part" in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. *The regulations also have construed the term "accessory" as meaning any article designed to be used in connection with such*

*vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.*

This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. \* \* \* *We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted. (Italics supplied.)*

The instant case speaks even more strongly for a finding that the seat covers were "parts or accessories", for each set was cut and sewed specially to fit a particular automobile, and had no other use. (R. 108.)

Taxpayer has apparently abandoned on appeal his argument that the covers are not embraced under the first paragraph of the regulation defining parts and accessories. His argument (Br. 45-48) is now directed to the second paragraph, which states that all articles which "have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories" shall be so considered "whether or not fitting operations are required in connection with installation". He would have the Court read the second paragraph as restricting the meaning of the first; that, in order to be a part or accessory, an article, in addition to its having been "designed to be attached to or used in connection with \* \* \* [an automobile]

to add to its utility or ornamentation", must have been "commonly or commercially known" as a part or accessory. But the second paragraph was not meant as an additional requirement to be super-imposed on the first. In neither paragraph is it stated or implied that in addition to falling under the terms of the first an article must also be commonly or commercially known as a part or accessory under the second. Rather than to restrict the scope of the first, the real purpose of the second paragraph, as seen from its language, was to prevent the first from being too narrowly construed in the situation where "fitting operations are required in connection with installation".

Even accepting taxpayer's position that to have been parts or accessories the seat covers must have been commonly or commercially known as such, we encounter no difficulty reconciling the District Court's finding with the Regulations. Taxpayer stresses the fact that he testified that the covers might not be recognizable if compared with ready-made covers. (R. 124.) But certainly no distinction can be taken between ready-made and custom-made covers in determining whether they are parts or accessories. There is no requirement that, for an article to be commercially known as a part or accessory, the uninformed layman must be able to recognize it for what it is. It is doubtful that the average layman could identify many of the numerous parts which form the engine or transmission of an automobile. They are nonetheless parts. The test is whether the article is "commercially known" and recognizable in the trade. Taxpayer has offered no evidence that it is not. Moreover, the implications are inescapable, and must lead inevitably to the conclusion that anyone in the business of manufacturing custom-made seat covers would recognize taxpayer's product

before installation. There is no evidence that his method was unique.

The fact that the installation may have required the attention of a skilled and experienced person in no way detracts, as taxpayer suggests it should (Br. 46-47), from the classification of the covers as parts or accessories.

### C. *Manufacture or Repair*

#### 1. *Definition of Manufacture*

There can be little question that the process employed by taxpayer, whereby seat covers were produced in his shop by the application of machinery and skilled labor to raw materials, was manufacturing, and that the final result was a manufactured article. Webster's New International Dictionary, Unabridged (2d ed.), gives this definition of manufacture: "To make (wares or other products) by hand, by machinery, or by other agency \* \* \*. To work, as raw or partly wrought materials, into suitable forms for use". Regulations 46 define a manufacturer as follows:

SEC. 316.4 *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

\* \* \* \* \*

In approving the definition in the above quoted regulation this Court said in *United States v. Armature Exchange*, 116 F. 2d 969, 971, certiorari denied, 313 U. S. 573:

This provision has appeared in the Treasury Regulations since 1920, during which time the stat-

ute taxing manufacturers and producers of automobile accessories has been reenacted, without change material to this cause, several times. "Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law." *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, 115, 59 S. Ct. 423, 426, 83 L. Ed. 536.

Clearly taxpayer's operation constituted manufacturing within the meaning of the controlling regulation. He owned and kept on hand an inventory of the various materials he used, and all of the cloth for the covers was taken from this inventory. (R. 52, 89.) His method of production was to start with just a plain bolt of material from which he cut pieces which he fashioned according to a pattern so as to fit the dimensions of a particular seat. Then a piece was cut from another material to the same dimensions and sewed to the underside of the covering as a facing. This operation was repeated for the various sections of the cushions and lazybacks. The several pieces were then sewed together and a decorative piping sewed at the seams. This work was done by the taxpayer and his employee in the shop (but not on the seat) by hand and with a sewing machine. The completed cover was then pulled on the seat and attached with tacks or hog rings. (R. 94-96, 111, 119-121.) Surely the District Court was correct in characterizing this process as manufacturing. It was the production of seat covers from plain bolts of cloth "by processing, manipulating, or changing the form of" the cloth as well as "by combining or assembling two or more" pieces of material.

If the operations in *United States v. J. Leslie Morris Co.*, 124 F. 2d 371 (C.A. 9th); *Clawson & Bals v.*



*Harrison*, 108 F. 2d 991 (C.A. 7th), certiorari denied, 309 U. S. 685; and *Clawson & Bals v. United States*, 182 F. 2d 402 (C.A. 7th), constituted manufacturing, then taxpayer's operations must also. In each of those cases the taxpayer had acquired old burned-out connecting rods which he reconditioned. In each case it was claimed that the process of reconditioning was in the nature of repair, not manufacture, because no transformation of product was attained. The process started and ended with connecting rods. The same argument was advanced in *United States v. Armature Exchange*, 116 F. 2d 969 (C.A. 9th), certiorari denied, 313 U. S. 573, and *United States v. Armature Rewinding Co.*, 124 F. 2d 589 (C.A. 8th), where worn-out armatures were reconditioned. Nevertheless, in each case it was held to be a manufacturing process. This Court reasoned in the *Armature Exchange* case (p. 971) that the worn-out article, since it no longer had any use as an armature, bore the same relation to the reconditioned article as raw material does to any manufactured article.

The instant case provides a much simpler and clear-cut illustration of manufacturing, for the process ended with an entirely different article from the plain strips of cloth which went into the making. Taxpayer began with plain rolls of material, which he transformed to finished seat covers by the application of skill and machinery. The material was cut to dimensions, sewed to other such sections, and finished with a piping around the edges. While the procedure may not have been difficult, complexity is not the mark of manufacturing. The conclusion of the District Court (R. 58) that "seat covers were in fact manufactured, for the cars came out of the shop with seat covers where there were none

in the shop when the cars were driven in", is persuasive.

## 2. Taxpayer Was the Manufacturer

It is at once apparent that, if seat covers were manufactured, someone must have manufactured them. Taxpayer contends that he was a repair man, and did no manufacturing. That would leave the purchaser of the seat cover as the only possible manufacturer. The District Court correctly ruled, however (R. 58-59), that the purchaser is not the manufacturer unless he brings in his own material to be worked on. In such a case, where he retains title to the article, it might be said that he has merely hired a workman to perform services, and, as employer, is the manufacturer himself. "On the other hand," said the District Court (R. 58-59), "where the jobber supplies the material as well as his skill and labor and the customer pays for the seat covers at a price for completed and installed seat covers, the jobber is the manufacturer and is liable for the tax". That the ownership of the article being worked on is important in determining who the manufacturer is, was recognized by this Court in *United States v. J. Leslie Morris Co.*, 124 F. 2d 371, 372, and by the Seventh Circuit in *Clawson & Bals v. Harrison*, 108 F. 2d 991, 993, certiorari denied, 309 U. S. 685. Regulations 46 also recognize that only where the purchaser is the owner of the material being worked upon will he be considered the manufacturer, and the workman a repairer.<sup>4</sup>

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<sup>4</sup> SEC. 316.4 \* \* \*

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

Taxpayer's insistence that he was merely a repair man seems to be founded on his view that the seats were being repaired. (Br. 35.) He would have the Court disregard the fact that his operations were aimed at producing, and did produce seat covers. He sold these covers at several price levels depending upon the grade of material. (R. 104.) The price reflected not only the cost of the raw material, but the cost of labor for measuring, cutting, and sewing the material. (R. 122-123.) The cost of installation was eliminated from the price, in accordance with Section 3441 of the Code (Appendix, *infra*) in arriving at the taxable basis. (R. 26, 45.) In any event it is stipulated that the amount of the assessment is proper if the seat covers are automobile accessories and were manufactured or produced as contemplated by Section 3403 of the Code. (R. 48, 51.) This is not a case where the owner of an automobile wants a rip or tear in his car seat mended, and contracts merely for labor and services.<sup>5</sup> In such a case he owns the seat, and the workman could be classified a repairer. See *Clawson & Bals v. Harrison*, *supra*, p. 993. In the instant case the seats were not being worked upon at all. Of course the seats were the incidental object for which the covers were being manufactured. But the fact that the covers were to aug-

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<sup>5</sup> Taxpayer usually repaired tears in the factory seat covers if there were any (R. 114), but never charged for this work because the dealers were such good customers (R. 110). On occasion he replaced broken springs with new ones (R. 95), and did any necessary welding (R. 104). But extra charges were assessed the customers for such items. (R. 104, 109.) It is seen that the price for the seat covers did not reflect any of these incidental repairs. The price included only the cost of the labor and material used in making and installing the covers, plus a profit margin. (R. 109, 122-123.)

ment and improve the seats does not mean that taxpayer was a repairer of seats instead of a manufacturer of seat covers. If the test of a repairer were, as taxpayer suggests, whether the article was made to augment or recondition another article, no automobile parts and accessories could be taxed to the manufacturer, for the primary feature of all such parts and accessories is that they are made with the ultimate objective of reconditioning or repairing the component parts of an automobile.

Taxpayer is attempting to divert the issue from whether he was manufacturing seat covers to whether the seats were repaired by the installation of the covers. But, as we pointed out above, the installation feature of taxpayer's work is no part of this case. The Government has not taxed his charges for installation. (R. 26.) The basis for the tax is the sales receipts attributable to the price charged for the seat covers only, before installation. The Code so requires. Section 3441. The District Court adequately answered taxpayer's argument that the question is whether he repaired the seats by installing the covers (R. 59):

\* \* \* the word "repair" in this context must have reference to the particular part or accessory in question. Thus since we are dealing with seat covers and not seats, the repairing must have reference to seat covers and not seats. In other words, plaintiff must claim that the seat covers are being repaired. A seat cover is repaired only if a portion of it is redone and the basic seat cover is still intact.

The question is, did taxpayer manufacture covers, so that he was subject to the tax, or did he merely repair

existing covers? To ask the question is to give the answer. It is beyond any possible dispute that no covers were in existence at the commencement of each job. Taxpayer started each job with plain rolls of material. His operations were not directed at repairing the material; they were aimed at transforming the material through the application of skill and experience, into finished seat covers. Taxpayer cannot hope to contend that this was not a manufacturing process, and that he was not the manufacturer.

Taxpayer argues (Br. 30-31) that seat covers are manufactured articles only where they are "produced and kept in stock for sale to the general market"; that inasmuch as his covers were "custom made", he cannot be considered a manufacturer. But Section 3403 makes no distinction between articles made to order and articles made for stock. The inquiry is, did he or did he not make the covers? There is a basic inconsistency in his argument that because he custom made the covers he did not make them at all. That he made them to order does not change the fact that his operations were manufacturing operations.

The case of *John J. Roche Co. v. Eaton*, 14 F. 2d 857, decided in 1926 by the District Court for the District of Connecticut, is distinguishable on its facts. There the tax was assessed on taxpayer's receipts from much more extensive operations than making seat covers. The company fitted side curtains, tops, seat covers, carpets, and generally reupholstered cars. Furthermore, it repaired automobile bodies and fenders. No attempt was made to segregate the repairs from the manufacture. Instead, the tax was assessed on the receipts from all the above items. Concededly much of the work done was in the nature of repair, so much so

that the court was able to say (p. 858) that "the dominant aspect of the transactions engaged in by the plaintiff was that of work performed." The District Court in the instant case said of the *Roche* case (R. 59) that it "seems to have overlooked the question of who is the manufacturer".

*D. Taxpayer's alleged distinction between sales and contracts for work, labor and material*

Taxpayer has made an elaborate argument. Br. 49-58) in an attempt to prove that the seat covers he produced were made under contracts for work, labor, and material, rather than contracts of sale within the meaning of the Uniform Sales Act. The clear language of Section 5 of that Act that "goods which form the subject of a contract to sell may be \* \* \* goods to be manufactured \* \* \* by the seller after the making of the contract to sell" is to the contrary. But, in any event, the meaning of Congress in enacting Section 3403 of the Internal Revenue Code is here in question, not the Uniform Sales Act or any other statute. Congress intended to impose the tax upon goods manufactured when title passed to a purchaser (Treasury Regulations 46, Sec. 316.5) and this precisely describes what transpired here. With respect to taxpayer's contentions, the following may also be taken into consideration:

First: A contract for work, labor, and material is not the equivalent of a contract to repair; it is just as consistent to find that it is a contract to manufacture. We need look no further than the case relied upon by taxpayer to illustrate this. In *Crystal Rec. v. Seattle Assn. Etc.*, 34 Wash. 2d 553, 558, 209 P. 2d 358, 361, the court said:

In order to resolve this question [where title was], we must first determine whether the agreement was a *contract for the sale* of goods to be manufactured or a *contract for the manufacture of goods*. If it be held the former, then the various provisions of the uniform sales act will apply in construing this contract. *If it be held the latter, then it is in the nature of the common-law contract for work, labor, and materials, \* \* \*.* [Italics supplied.]

It is plain that the court considered "a contract for the manufacture of goods" to be "in the nature of the common-law contract for work, labor, and materials". The basic question whether taxpayer was a manufacturer or a repairer is not answered by resort to the common law of sales or the Uniform Sales Act. Nor is it answered by asserting that the contract was for work, labor, and material.

Second: Even considering the Uniform Sales Act as having some remote bearing on whether taxpayer manufactured and sold seat covers within the meaning of the Internal Revenue Code, taxpayer has failed to recognize the basic distinction between a contract to sell and a sale. The Sales Act definition of a sale is in Section 1 (2) of the Uniform Act: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." Taxpayer urges that since there were no contracts to sell (he contends they were contracts for work, labor, and material), there were no sales. It may be, although we do not concede, that there were no contracts to sell, within the meaning of the Sales Act, but when the covers were completed, their transfers to the purchasers could be nothing else than actual sales under Section 1 (2).

Third: The cases cited by taxpayer were sales cases in which it was important to distinguish contracts for work, labor, and material from contracts to sell. If the case could be construed as a contract to sell it would fall under the mantle of the Sales Act which established statutory tests for determining where title was, and provided certain statutory remedies not available under the common law. It also gave rise to implied warranties of merchantability and fitness for purpose, not present at common law. But to repeat, those cases do not mean that where goods are manufactured and title transferred to the purchaser under a contract, there has been no actual sale merely because the contract was for work, labor, and material rather than a contract to sell.

We do not think there can be any serious question as to whether seat covers were sold by the taxpayer to his customers. If it is important to look to the intention of the parties to determine whether the price represented the charge for seat covers rather than a charge for services, then the evidence shows these were sales of goods, not the price for services performed. Taxpayer had flat charges of \$18, \$28, and \$35 *for the covers*; the price depended only on the material used. (R. 104, 109.) There is no indication that the customers were charged varying rates depending on the labor time and difficulty of the job.

Fourth: It is familiar law that taxes are a practical matter, and the Code should be construed consistently with common understanding of words in order to stress substance over form. It seems fair to say that seat covers were sold by taxpayer within the meaning of Section 3403 of the Code regardless of technical restric-



tions placed on the word "sale" in the Uniform Sales Act.

The state court decisions cited by taxpayer (Br. 56) as applying the distinction between a contract for work, labor, and materials and a contract to sell are to be distinguished. In *Samper v. Indiana Dept. of State Revenue*, 231 Ind. 26, 106 N.E. 2d 797, the taxpayer admittedly was in the business of repairing radios. The Indiana Code taxed receipts from repairs at a higher rate than receipts from sales of tangible personal property. The taxpayer claimed that the portion of his receipts from repairs, attributable to the cost of tubes and other material he used to repair radios, should be taxed as sales, not repairs. It was held that this amount was taxable as repairs. The important distinction, recognized in *Clawson & Bals v. Harrison*, 108 F. 2d 991, 993 (C.A. 7th), certiorari denied, 309 U. S. 685, and *United States v. J. Leslie Morris Co.*, 124 F. 2d 371, (C.A. 9th), is that the radios remained the property of the persons for whom the repairs were performed. The same may be said of *Singing River Tire Shop v. Stone*, 21 S. 2d 580 (Miss.), where the taxpayer vulcanized and recapped tires, but the tires belonged to the persons for whom the work was done. The tax in *Gross Income Tax Div. v. Conkey Co.*, 228 Ind. 352, 90 N.E. 2d 805, was applicable to gross income from whatever source, the question being whether the tax, as applied, was an invalid interference with and burden on interstate commerce. The case should be read in the light that state courts will go far in attempting to solve their local revenue problems. The court upheld the validity of the tax on a printer of books, holding that he was not selling goods in interstate commerce, but had merely entered into local contracts

for work, labor, and material. Compare *Dept. of Treasury v. Mfg. Co.*, 313 U.S. 252, where a similar tax statute was upheld against the same objection. However, the article on which the taxpayer worked was owned by the party for whom the work was performed; so clearly, the receipts were for services, not from sales.

In the final analysis it seems to us that this argument of taxpayer, that his contracts were for work, labor, and material under the law of sales, is merely another way of stating his contention that he was a repairer, not a manufacturer. That is the ultimate point of which he wishes to persuade this Court. We have fully discussed our view that he was a manufacturer.

### *E. The rulings*

#### 1. The Government Has Not Reversed Its Position as to the Taxability of Taxpayer's Sales

Taxpayer argues (Br. 16-28) that the Internal Revenue Bureau changed its position as to the taxability of sales of automobile seat covers, and that he, the taxpayer, has been injured because of his reliance on the rulings in effect during the tax years. The fact is that the Bureau has consistently maintained that sales such as taxpayer's are taxable under Section 3403. In its ruling of August 18, 1952 (S. T. 944, 1952-2 Cum. Bull. 255 (Appendix, *infra*)) the Bureau pointed out that it had—

issued rulings \* \* \* that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is

not affected by the ruling herein, and tax continues to attach, as in the past, to such sales.<sup>6</sup>

This ruling reiterated the Bureau's position that sales to dealers were taxable.

Taxpayer argues that inasmuch as there were no public rulings on seat covers, he was entitled to rely on rulings relating to other parts and accessories taxable under Section 3403. (See Br. 19-21.) But each of the rulings to which he refers deals with repair jobs. If, as we contend, the taxpayer was a manufacturer, not a repairer, those rulings are inapposite here. Moreover, the final answer to this argument is that he did not rely on these, or any other rulings.

It is clear from his testimony (R. 106) that he knew nothing about excise taxes. It is apparent that before June of 1952, he was not even aware that there was a manufacturer's excise tax. (R. 104-106.) If taxpayer is trying to raise an estoppel, he must surely show actual reliance. It is not enough that he might have relied on prior rulings had he been aware of them. It is no answer (Br. 26) that he did not collect the taxes from his customers, and will thus have to bear the burden himself. Section 3403 placed the liability for the tax on him.

## 2. Legal Effect of Rulings

We have shown above that the Bureau has consistently applied the manufacturer's excise tax to operations such as that of taxpayer. However, even if there

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<sup>6</sup> The purpose of this ruling was to announce that, after the effective date, sales of custom-made seat covers by the manufacturer to the consumer were to be taxed as well as such sales to dealers. Prior to the ruling sales to dealers were taxed while sales to individual owners of automobiles were not taxed. This distinction was discarded by the ruling.

were inconsistencies in the application of the tax, that would be no reason to set aside the assessment. Regulations and rulings are not binding on the Bureau if wrong. *Goldfield Consol. Mines v. Scott*, 247 U.S. 126. The Commissioner has the power to reverse the position he took in prior rulings even where such action might retroactively affect a taxpayer adversely. In *Tonningson v. Commissioner*, 61 F. 2d 199 (C. A. 9th), the argument was advanced that the effective ruling during the tax year in question allowed a certain deduction, whereas a ruling issued subsequently was being applied retroactively so as to deny the deduction. This Court held (pp. 199-200):

The argument advanced as to the applicability of I. T. 1171 [the prior ruling] to the tax return in question is answered adversely to petitioners by the settled rule that the Commissioner is not precluded by a previous determination from re-examination and redetermination of tax liability.

The recent decision of the Sixth Circuit in *Automobile Club of Mich. v. Commissioner*, 230 F. 2d 585, is in point. There, with reference to a revocation of a ruling the court pointed out (p. 589) that "The Commissioner is not bound by his own or his predecessor's prior mistakes of law". See *Wilbur Nat. Bank v. United States*, 294 U. S. 120, 123-124; *Chiquita Mining Co. v. Commissioner*, 148 F. 2d 306 (C. A. 9th).

Under the above principles, *Johnnie & Mack, Inc. v. United States*, 123 F. Supp. 400 (S. D. Fla.), was wrongly decided. It may be that under the rulings prior to August 18, 1952, manufacturers of seat covers who sold directly to consumers were not taxed under Section 3403. But this is no justification for holding

that those who sold to dealers should thereby be relieved. Sales to dealers were always taxable under the rulings. The court in *Johnnie & Mack* apparently felt that since the distinction in the rulings between sales to individuals and to dealers was unwarranted, sales to neither were to be taxed. That there may have been an invalid distinction in the old rulings affords no basis for holding neither group taxable. Inasmuch as the Commissioner can, with retroactive effect, remedy prior incorrect rulings (*Tonningsen v. Commissioner, supra*) certainly correct rulings should not be disregarded for the sake of achieving uniformity of treatment. "The proper view to take", said the court below (R. 56), "where there is no warranted distinction between sales to individuals and sales to dealers is to hold all such sales taxable regardless of the type of buyer".

## CONCLUSION

For the reasons given above the judgment of the District Court was correct and should be affirmed.

Respectfully submitted,

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May, 1956.

## APPENDIX

## Internal Revenue Code of 1939:

SEC. 3403.<sup>7</sup> TAX ON AUTOMOBILES, ETC.

There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(a) [as amended by Sec. 544(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 481(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452] Automobile truck chassis, automobile truck bodies, automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (including in each of the above cases parts or accessories therefor sold on or in connection therewith or with the sale thereof), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. A sale of an automobile truck, bus, or truck or bus trailer or semitrailer, shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(b) [as amended by Sec. 481 (b) of the Revenue Act of 1951, *supra*] *Other Chassis and Bodies, Etc.*—Other automobile chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles, and motorcycles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof),

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<sup>7</sup> None of the amendments to Section 3403 are relevant to the issues here involved and the language of the section may be regarded as substantially the same during the entire period in question.

except tractors, 10 per centum, except that on and after April 1, 1954, the rate shall be 7 per centum. A sale of an automobile, trailer, or semitrailer shall, for the purposes of this subsection, be considered to be a sale of the chassis and of the body.

(c) [as amended by Sec. 544 (b) of the Revenue Act of 1941, *supra*; Sec. 605(c)(1) of the Revenue Act of 1950, c. 994, 64 Stat. 906; and Sec. 481 (c) of the Revenue Act of 1951, *supra*] Parts or accessories (other than tires and inner tubes and other than radio and television receiving sets) for any of the articles enumerated in subsection (a) or (b), 8 per centum, except that on and after April 1, 1954, the rate shall be 5 per centum. \* \* \*

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 3403.)

#### SEC. 3441. SALE PRICE.

(a) In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

\* \* \* \* \*

(26 U.S.C. 1952 ed., Sec. 3441.)

Treasury Regulations 46 (1940 ed.), promulgated under the Internal Revenue Code of 1939:

SEC. 316.4 *Who is a manufacturer.*—The term “manufacturer” includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, is liable for the tax, and not the person who buys, and assembles a taxable article from, such component parts.

SEC. 316.55 *Definition of parts or accessories.*—The term “parts or accessories” for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term “parts and accessories” shall be understood to embrace all such articles as have reached such a stage of manufacture that they are com-



monly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis, taxable tractors, or motorcycles, are considered parts of or accessories for such articles whether or not primarily designed or adapted for such use.

S. T. 944, 1952-2 Cum. Bull. 255:

Section 3403 (c) of the Code, as amended, imposes, effective November 1, 1951, a tax of 8 percent on the sale by the manufacturer of parts or accessories for vehicles taxable under subsection (a) and (b) of section 3403 of the Code, as amended, except that on and after April 1, 1954, the rate of tax shall be 5 percent. Seat covers for automobiles are considered to be parts or accessories within the meaning of section 3403 (c) of the Code, as amended, and sales thereof by the manufacturer are subject to tax.

The Bureau has issued rulings heretofore that the only circumstances under which the tax does not apply to sales of seat covers by a manufacturer, is where the seat covers are individually designed, cut, tailored, and fitted by the manufacturer to the automobile belonging to the person who contracts for the performance of such operation, and such person is the consumer of the seat covers. Such rulings provided, however, that the sale of seat covers, similarly produced, to a dealer in new or used automobiles is not a sale for consumption but

one for resale, and that the tax attaches to the manufacturer's sale thereof.

Upon reconsideration of the matter, the Bureau is now of the opinion that where a manufacturer furnishes the material and produces automobile seat covers for the consumer thereof, according to individual design and measurement, the sale by the manufacturer of such seat covers is taxable under section 3403(c) of the Code, as amended, regardless of whether they are installed by the manufacturer or by other persons.

The Bureau has issued rulings, as stated above, that sales by a manufacturer of seat covers, produced according to individual design and measurements, to a dealer in new or used cars are not considered sales for consumption, and are subject to tax. The taxability of such sales is not affected by the ruling herein, and tax continues to attach, as in the past, to such sales.

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**No. 14,995**

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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MASAO HIRASUNA, doing business as  
Mike's Auto Top Shop & Uphol-  
stery Shop,

*Appellant,*

vs.

S. V. McKENNEY, District Director  
of Internal Revenue,

*Appellee.*

Upon Appeal from the United States District Court  
for the District of Hawaii.

**CLOSING BRIEF FOR MASAO HIRASUNA, APPELLANT.**

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**FILED**

**MAY 16 1956**

**PAUL P. O'BRIEN, CLERK**



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**SUMMARY OF ARGUMENT.**

(1) The appellee has overlooked a very important late decision of the Supreme Court of the United States, affirming a decision of this Court of Appeals, decided only on March 5, 1956, unknown and unavailable to the writer of the opening brief when he sent it in to the printers, on the question of inconsistent rulings by the Treasury Department. Said case clearly contradicts appellee's position.

(2) Appellee fails to grasp fundamental concept of "contract for labor and materials". The Hawaii

Uniform Sales Act specifically recognizes contracts for labor and materials. The performance of a contract for labor and the supplying of materials is not a "sale" of an "auto part".

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## ARGUMENT.

### I.

#### MOST RECENT DECISION OF SUPREME COURT OF UNITED STATES REFUTES APPELLEE'S ARGUMENT REGARDING RULINGS.

Appellee's argument that the "Commissioner is not bound by his own or his predecessor's prior mistakes of law" (ans. br. 26-29) is an admission that there was a substantial change of position with relation to seat covers made to the order of the customer.

Appellee's answering brief, attempting to uphold its *ad hoc* change of interpretation of August 18, 1952, reversing its long continued practice of excluding custom installed seat covers as "parts or accessories", may be directly answered by citing and quoting from the most recent case of *United States v. Leslie Salt Co.*, ..... U.S. ...., 76 S.Ct. 416, decided only on March 5, 1956, which affirms the decision by Judge Healy of this Circuit Court of Appeals reported in 218 F.2d 91 and that of District Judge Goodman reported in 110 F.Supp. 680.

The Supreme Court, in said decision, held that where Treasury Department *had long interpreted* terms "debenture" and "certificate of indebtedness" to exclude certain long term corporate promissory



notes, and such interpretation had express and implied congressional acquiescence for many years, and was in accord with generally understood meanings of respective terms, though treasury had recently *ad hoc* changed interpretation to include such instruments, court would consider prior interpretation persuasive in determining whether to construe statute to exclude such promissory notes. In so holding, the Supreme Court stated at pages 423-425 (S.Ct. Rep.) as follows:

“There are persuasive reasons for construing ‘debentures’ and ‘certificates of indebtedness’ in accordance with the Treasury’s original interpretation of those terms in this statute’s altogether comparable predecessors. In *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796, Mr. Justice Cardozo said:

*‘administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. United States v. Moore, 95 U.S. 760, 763, 24 L.Ed. 588; Logan v. Davis, 233 U.S. 613, 627, 34 S.Ct. 685, 58 L.Ed. 1121; Brewster v. Gage, 280 U.S. 327, 336, 50 S.Ct. 115, 74 L.Ed. 457; Fawcuss Machine Co. v. United States, 282 U.S. 375, 51 S.Ct. 144, 75 L.Ed. 397; Interstate Commerce Comm. v. New York, N.H. & H.R. Co., 287 U.S. 178, 53 S.Ct. 106, 77 L.Ed. 248 \* \* \*. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of*

*making the parts work efficiently and smoothly while they are yet untried and new.'*

*Against the Treasury's prior longstanding and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence, through the 1918 amendment to the statute (76 S. Ct. 420), which has ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years. See Corn Products Refining Co. v. Commissioner, 350 U.S. 46, 53, 76 S.Ct. 20, 24; Norwegian Nitrogen Products Co. v. United States, supra, 288 U.S. at page 313, 53 S.Ct. at page 357. Still further, it is an interpretation which is in accord with the generally understood meaning of the term 'debentures'. Cf. First Nat. Bank of Cincinnati v. Flershem, 290 U.S. 504, 508, 54 S.Ct. 298, 78 L.Ed. 465. 'The words of the statute (a stamp tax statute) are to be taken in the sense in which they will be understood by that public in which they are to take effect.' United States v. Isham, supra, 17 Wall. at page 504, 21 L.Ed. 628.'* (Emphasis ours.)

The foregoing decision of the Supreme Court is very pertinent herein in that the Treasury Department in the present case, by its *ad hoc* ruling of August 18, 1952, made a complete turnabout with relation to the taxability of custom installed seat covers, contrary to a "contemporaneous construction of a statute by men charged with the responsibility of setting its

machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." While the case before the Supreme Court involved a stamp tax and this present case involves a sales tax; the analogy, in both cases, by way of parallel *ad hoc* subsequent contradictory rulings, makes the aforementioned recent Supreme Court ruling most pertinent, if not controlling.

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## II.

### APPELLANT'S ARGUMENT REGARDING CONTRACT FOR WORK, LABOR AND MATERIAL, REMAINS UNANSWERED.

Appellee's answering brief attempts to answer appellant's argument that the contract was for labor and materials (ans. br. 22-26), but the answer is inadequate and completely fails to grasp the elementary concept of a contract for labor and materials.

The concept is not one unknown in Hawaii in that Section 9204 of the Revised Laws of Hawaii 1945, a portion of our uniform sales act, provides:

"but if goods are to be manufactured by the seller especially for the buyer and not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply."

The customer in the present case agrees to have the appellant using his specialized labor put in the customer's automobile certain materials which has no semblance of an auto part. Appellant performs the work, charges for what he has contracted to do, sup-

ply labor and materials. There is no tax on the performance of labor, nor is there a tax on the supplying of bare cloth material. The transaction is one definitely recognized in law as not being a sale. The revenue act taxes the "sale" of "auto parts" and no other.

Dated, Honolulu, T. H.,

May 11, 1956.

Respectfully submitted,

SHIRO KASHIWA,

*Attorney for Appellant*

*Masao Hirasuna.*

No. 14,995

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

MASAO HIRASUNA, doing business as  
Mike's Auto Top Shop & Uphol-  
stery Shop,

*Appellant,*

vs.

S. V. McKENNEY, District Director  
of Internal Revenue,

*Appellee.*

Upon Appeal from the United States District Court  
for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

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GENRO KASHIWA.

FILED

MAY 10 1957

PAUL P. O'BRIEN, CLERK



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---

**STATEMENT.**

This cause was argued in early October 1956 and after a *considerable delay*, unusual in the experience of appellant's counsel in this Court, on April 12, 1957, the decision of the court below was sustained by this Court. A strong three page dissenting opinion filed by the Honorable James Alger Fee, Circuit Judge, shows that the problems presented by the case, were not without merit nor without difficulty.

This test case presented, though it involves a bare \$1,391.92, a very important nation-wide question to the automobile repair industry. Appellant's attorney received numerous inquiries from attorneys in other mainland cities confronted with the same problem and, though this case involves a small figure, the nation-wide effect will involve a large sum.

Appellant hereby requests a rehearing, not only for the reasons hereinafter specifically stated but because of the strong dissenting opinion filed in this cause and contrary opinions of federal district courts in other jurisdictions rendered after this case was submitted on October 3, 1956. Appellant's attention to these other district court decisions, was called after the receipt of the decision in this cause.

Under Rule 23 of this Court, if a rehearing is granted, it is suggested that the case be reheard en banc because of the nation-wide importance of this case. These upholsterers are small businessmen and an 8% tax on the gross out of their own pockets is an all important question to them. Time spent listening to tax inequities voiced by small businessmen is time well spent.

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#### QUESTIONS PRESENTED.

(1) The record showed that appellant in the Court below tried to show "inaction" by the tax collectors in Hawaii but he was prevented in the trial Court. This error of the trial Court cannot be ignored.

(2) That *United States v. Keeton*, 238 F.2d 878, is not a case in point because the dispute in said case was for taxes after August 18, 1952, the date of the public ruling. The present case covered a period before.

(3) That two new decisions by federal district courts on the question since October 3, 1956, have been in appellant's favor.

(4) The decision of Circuit Judge Hamley will broaden this field of taxation to subjects beyond the comprehension of Congress. Auto painting, auto greasing and auto polishing will hereafter be the sale of auto parts.

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#### ARGUMENT.

(1) It is submitted that the dissenting opinion by Circuit Judge James Alger Fee wherein he stated:

"The main opinion is erroneous because it apparently decides that the construction of the statute and regulations which is there adopted in 1957 would override a consistent long standing administrative interpretation by the federal agency itself.

This statute and the applicable regulations are not so plain in the commands thereof to leave nothing for construction. Indeed, these were construed contrary to our present interpretation in 1926 by the opinion in *John J. Roche Co. v. Eaton*, 9 Cir., 14 F.2d 857. This theory was affirmed and adopted by a District Court in 1954 in *Johnnie & Mack, Inc. v. United States*, 123 F. Supp. 400.

The main opinion here resolves the matter as if the case were of first impression. So does the decision in *United States v. Keeton*, 4 Cir., 238 F.2d 878. But in the instant case the point was squarely raised *that the agency had acquiesced in the construction of the statute in the Roche case for a period of over twenty-five years and, as a result, had left untaxed installers of seat covers on automobiles.* It was also contended that this course of action was summarily reversed after the bulletin of August, 1952, by the identical agency. It may be agreed that the evidence was insufficient in the instant case. But the exact contention has been raised in other cases, notably, *Martin v. Andrews*, 9 Cir., 238 F.2d 552, where we held that the suit was premature and where the merits were not considered. *We should not bind all of the judges of this Court to our present interpretation in other causes where more evidence of contrary administrative practice might conceivably be.*" (Emphasis Supplied.)

is correct. In the trial below appellant tried to bring the necessary evidence of "inaction" but he was stopped. The transcript at pages 85-86 shows that with relation to questions to witness Clyde Lee, Revenue Agent, the following:

"Q. You yourself made several assessments?

A. I have made some assessments besides this one.

Q. That is not hearsay: you know that of your own knowledge?

A. That is right.

Q. And in all of those cases there were no returns filed in the respective years?

Mr. Dwight. Objections, your Honor. This line of questioning has gotten off to immaterial facts as to what happened in other cases.

The Court. Sustained."

Circuit Judge Hamley stated as follows at page 10 of the decision:

"We do not have before us the question of whether private, as distinguished from public, rulings amounted to an administrative construction of the act, for no evidence as to any such private rulings is to be found in this record. *Nor is there here a showing as to general inaction by the bureau with regard to the assessment of such transactions sufficient to present a question of administrative construction.*" (Emphasis ours.)

Appellant tried to show said "inaction" in the Court below but as above indicated he was stopped in the court below but in the Court of Appeals he is told that he should have gone ahead and proved it. *Appellant, a small businessman, surely cannot be made to understand that justice operates in this abrupt manner.*

The "inaction" is furthermore apparent by the crop of cases which have been recently adjudicated in the various federal district courts. Cases heretofore cited in the opening brief and new cases cited in this brief clearly show what the administrative practice has been. See especially record in *Martin v. Andrews*, 9 Cir., 238 F.2d 552, decided by this Court on or about April 1957 (Case No. 14995) which conclusively shows "inaction" in the Los Angeles area of Cali-

fornia. Appellee in his answering brief admits the Commissioner's mistake by arguing that the "*Commissioner is not bound by his own or his predecessor's prior mistakes of law.*" (Ans. Br. 26-29.)

If Appellant were allowed production of such evidence in the Court below, it would clearly have shown that the administrative "inaction" in Hawaii was uniform with the facts showing "inaction" in the present case.

It is respectfully submitted that *United States v. Leslie Salt Co.*, 350 U. S. 383, quoted in the dissenting opinion must be given the highest respect because the said case originated from this 9th Judicial Circuit and this court was sustained by the Supreme Court in strong language far in excess of what this Court decided. See 218 F.2d 91 for this Court's opinion in said case.

(2) *United States v. Keeton*, 238 F.2d 878, relied upon by Circuit Judge Hamley of this Court, at page 4 of his opinion, is not exactly in point because the *Keeton* suit expressly involved excise taxes due "on and after August 18, 1952." The public ruling quoted at page 8 of the decision of Circuit Judge Hamley became effective on August 18, 1952.

Appellant in this case takes issue of the taxes assessed against him *before August 18, 1952*, when everyone in the business was without the benefit of the ruling of August 18, 1952. It is submitted that this is a material difference, in that the practical effect is that appellant is forced to pay his taxes out of his pocket.

It is submitted that there is no reported case which disallowed recovery for assessments made for the same taxes before August 18, 1952. See *John J. Roche Co. v. Eaton*, 14 F.2d 857, *Johnnie & Mack Inc. v. U. S.*, 123 F.Supp. 400 (S. D. Fla).

(3) After the submission of this case for argument on or about October 3, 1956, two federal district courts have agreed with appellant. In *Johnnie & Mack Inc., v. U. S.* (U. S. Dist. Court, S. Dist. of Fla. No. 6621-M, January 30, 1957) the court held as follows:

"1. Sales of seat covers in the instant case are sales of labor and material and not sales of seat covers as accessories.

"2. It was not the intent and purpose of Congress to classify the Plaintiff as a manufacturer and *as further evidenced by the ruling of the Internal Revenue Bureau which was in effect for seventeen (17) years from 1953 (ST824, CB December 1935, page 368).* (Emphasis ours).

"3. On the 16th day of June, 1954, before the Hon. John W. Holland presiding, this Court in a case involving the same parties and the same facts as the instant case, the Court found that the Plaintiff's sales of seat covers were sales of labor and material and not sales of seat covers as accessories, and after having heard the testimony in this case, I find no valid reason for disturbing this ruling."

The effect of ST824 above referred, was argued on page 19, appellant's opening brief. Said public ruling of 17 years read as follows:

"Prentice Hall, Fed. Tax Service Vol. 3-8, Paragraph 38,571.

“Taxability of sale or use of parts or accessories measured and cut from raw or bulk material.—\* \* \* A jobber or dealer frequently buys material, not subject to tax, and *by cutting or processing the material to the required length or size produces a part or accessory. In deciding whether the transaction is taxable, the Bureau has drawn a distinction between an immediate repair job and a sale for future use. If the part or accessory is cut or produced from lengths of rolls of material for immediate use by a repairman in a repair job on which he is then working, the sale thereof by the jobber or dealer to the repairman is deemed to be a sale of material not subject to tax.* If, however, the jobber or dealer transforms lengths or rolls of material into parts or accessories and places the finished articles in stock for future use or disposition, he thereby becomes the manufacturer of such articles within the meaning of the Act, and his subsequent sale or use thereof is taxable under section 606 (c) of the Revenue Act of 1932. (S.T. 824, CB. Dec. 1935, p. 368.)” (Emphasis ours).

It is in plain language and the Florida district Court was absolutely correct.

In *Lee R. Brown v. Ellis Campbell, Jr., District Director* (U. S. District Court, N. Dist. of Texas, Dallas Div. No. 6486, Oct. 24, 1956) the Court held as follows:

“Now, further back it is agreed that, ‘During the tax years in question plaintiff owned and operated a proprietorship in Dallas, Texas known as Brown’s Top & Seat Cover Company. Plaintiff did not carry any stock or ready made seat covers. Plaintiff carried a varied stock of ma-



terials which he purchased from manufacturers and wholesalers in large quantities and in various types, qualities and colors. These materials came in rolls or bolts. The customer would choose his desired materials from the stock and plaintiff would remove the seats and back rests and place them on tables where he would measure the material to the seats and back rests of the customer's car, making the material, then removing the material and cutting it to fit.

"In instances where the seats or back rests could not be removed he would place the material on the seats or back rests of the customer's car, marking same, and remove it to be cut.

"The several pieces are then sewed together and a decorative piping sewed at the seams. The materials so sewed together are then fastened to the seats and back rests of the automobile.

"The price to the customer is fixed by the price of the material plus labor and overhead costs and profit.

"The aforesaid business, as conducted by plaintiff, is commonly referred to and known as a 'custom-made seat cover business.'

"Now, the statute is that there is hereby levied and imposed upon parts or automobile accessories, and for any other article enumerated in subsection 'A' sold by manufacturers, producers or importers, a tax equivalent to eight per cent.

"I feel that the tax as levied by the wording of the statute *does not cover what we might call tailors engaged in the manufacture of seat covers.* He doesn't have any stock, he is not classed as a manufacturer, he is a tailor and makes a garment to suit you. This man makes a seat cover for you. To cover him I think the statute would have to

be explicit and it is not the purpose of the Court to extend the statute. (emphasis ours).

"I don't believe the statute covers it, so, the plaintiff would be entitled to recover."

The writer of this brief has requested West Publishing for citations of said cases but to date he has not received a reply. Both of the above cases are reported in "Prentice-Hall," Federal Taxes (Permanent Volume) Vol. 3-A at pages 44,481-44,483.

It is respectfully submitted that both decisions are based on arguments submitted by appellant in his opening brief.

(4) The decision of Circuit Judge Hamley will necessarily have far-reaching results never contemplated by Congress. In the oral argument before the Court, counsel for appellant submitted that if the government's point of view is accepted, auto painting will be a sale of auto parts because the paint "improves" the vehicle; it is "attached" to the vehicle "to add to its utility or ornamentation" and its use is in "connection with such vehicle." See definition of "parts or accessories," appendix herein, and at bottom of page 3 of Circuit Judge Hamley's opinion. And manufacturing takes place when "combining or assembling two or more articles." See appendix for regulation defining "manufacturing." The present case involves covering seats with a solidified plastic or related material using thread and hog rings, painting involves "combining" of component parts of paint and covering the car with non-solid plastic or related material. Both attach to the car. Both require "processing, manipulating or changing of the form of the article." If the decision of Circuit Judge Hamley is

taken on its face, appellant sees no avenue of escape for the auto painters, another group of small businessmen. Will they also suffer the retroactive reaches of a statute and regulation of "broad command"? There must be a limitation. The decision by Circuit Judge Hamley apparently nullifies the provision "commonly or commercially" known as a part or accessory. Appellant strenuously argued that the evidence was uncontradicted that the article made by appellant prior to installation had no other use than to cover the seats it was specially made for and therefore was not an auto part. Appellant's opening brief pp. 45-48.

It is submitted that if Circuit Judge Hamley's decision is allowed to stand "auto painting" will be a sale of parts. Even "greasing" will come within the meaning of the decision. Polishing, as well, perhaps.

Congress certainly didn't intend any such interpretation.

In accordance with the rules of this Court, regulations referred to herein, are hereinafter recited in the appendix.

Dated, Honolulu, T. H.

May 1, 1957.

Respectfully submitted,

SHIRO KASHIWA,

*Attorney for Appellant  
and Petitioner.*

On The Brief:

GENRO KASHIWA.

## CERTIFICATE

I, Shiro Kashiwa, an attorney for appellant, certify that the foregoing petition for rehearing is in my judgment well founded, and is not interposed for delay.

Dated, Honolulu, T. H.

May 1, 1957.

SHIRO KASHIWA.

(Appendix Follows.)

## **Appendix.**



## Appendix

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### Treasury Regulations 46

“Sec. 316.4 Who is a Manufacturer.—The term ‘manufacturer’ includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

“Sec. 316.55 Definition of Parts or Accessories.

“(a) The term ‘parts or accessories’ for an automobile truck or other automobile chassis or body, taxable tractor, or motorcycle, includes (1) any article the primary use of which is to *improve*, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be *attached* to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in *connection* with such vehicle or article whether or not essential to its operation or use. However, such term does not include tires, inner tubes, or automobile radio or television receiving sets, since these articles are expressly excluded by the statute from the tax on parts of accessories. With respect to fare registers and fare boxes for use on busses and automobiles, see §316.140.

“(b) The term ‘Parts and accessories’ shall be understood to embrace all such articles *as have reached such a stage of manufacture that they are commonly or commercially known as parts and accessories whether or not fitting operations are required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.*” (Emphasis ours.)















